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BY

F. M. GOADBY, Esq., D.C.L.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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# THIRTY YEARS' WORKING OF THE AUSTRALIAN CONSTITUTION.

[*Contributed by* STEPHEN MILLS, ESQ., C.M.G.]

IN 1903 Sir Samuel Griffith was appointed the first Chief Justice of the High Court of Australia, with two colleagues, Sir Edmund Barton and Mr. R. E. O'Connor, K.C. They had all taken part in the Federation movement and had been members of Constitutional Conventions. In 1907 these three justices, in the course of a joint majority judgment (there were then five members of the court) in Baxter's case,[1] gave a short historical review.

> We may assume [they said] that the relative advantages and disadvantages of these several systems (those of the United States, Canada, and Switzerland) were weighed by the framers of the Constitution . . . we may take it, that, amongst other things, the Canadian Constitution, which had been in operation for some 30 years, was considered. . . . There were two conspicuous points relative to the Dominion Constitution : (1) That it gave the residue of power to the Central Government ; (2) that its interpretation by the Judicial Committee [of the Privy Council] had not given universal satisfaction. It is not necessary to refer to the Swiss Constitution. We turn to the other great constitutional document, the Constitution of the United States. . . . Its scheme is to grant or delegate to Congress certain specific powers of government, all other powers being retained by the States. . . . It had been found by the experience of a century that under the American scheme, where two distinct governments exercised authority over the same locality and the same persons, so that every citizen owed allegiance to and was bound to obey the laws of two distinct governments, conflicts had continually arisen as to what were called the constitutional powers of the General Government and the State Governments. . . . So, in the case of such conflicts between the Federal Government and the States some arbitrator was necessary. It was well known that in the United States one of the most important functions of the Supreme Court had been to act as such arbitrator, and that a large body of law had grown up, founded upon the decisions of eminent jurists, familiar with the written Constitution and with its practical operation.
>
> It was common knowledge, not only that the decisions of the Judicial

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[1] 4 C.L.R. at p. 1109.

Committee in Canadian cases had not given widespread satisfaction, but also that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution. It was known that even if there should be any members of the Judicial Committee familiar with the subject it was quite uncertain whether they would form members of the Board that might be called upon to determine a question on appeal from an Australian court, by which it must necessarily be dealt with in the first instance. It could not be predicted of the Board which would sit to entertain an appeal that it would be constituted with any regard to the special familiarity of its members with the subject. And no disrespect is implied in saying that the eminent lawyers who constitute the Judicial Committee were not regarded as being familiar with the conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities who had long enjoyed the privilege of self-government.

On the other hand, the founders of the Australian Constitution were familiar with the part which the Supreme Court of the United States, constituted of judges imbued with the spirit of American nationality, and knowing that the nation must work out its own destiny under the Constitution as framed or as amended from time to time, had played in the development of the nation and the harmonious working of its political institutions.

But whatever the complex of motives which actuated one or two leading members of the Federal Convention to frame the new Constitution on the American model, perhaps after all that choice was inevitable. The State representatives, long divided by parochial pride and provincial paranoia, were now united by a prophetic fear of the probable encroachments of the Central Authority they were about to create, upon the uncatalogued residue of powers which they were reserving for themselves. To their mood, the Canadian model, which makes the Central Authority strong and the provincial authorities weak, was entirely unacceptable. They thought of themselves as creating the Commonwealth and endowing it with certain specified powers. If it was to be effective there was no escape from the necessity to make it supreme in a few of the most important categories of government. But the limits of those categories were difficult to fix, and it was still more difficult to provide safeguards against the possibility that limits apparently fixed would prove to be movable. They had vision enough to see that the new Central Authority and the old provincial authorities (henceforth to be called States) would frequently differ as to the boundaries of their respective powers. A strong and permanent umpire would be needed, hence the provisions in the Constitution for the establishment of the High Court of Australia and subordinate Federal Courts. A Constitution of the American type is a fertile breeder of litigation, and the High Court has realized the pre-Federation dreams of Sir Samuel Griffith. " Eminent jurists " have appeared, " a large body of law " has been created, as witness the 43 volumes of Commonwealth Law Reports which record the activities of the High Court during its 28 years of existence.

**The Power to Tax.**—Very soon after the High Court had been established, the smallest of the States—Tasmania—in connexion with the smallest of money claims—a claim for *2d.* stamp duty—raised before the High Court one of the greatest of Constitutional issues.[1] A State Act had prescribed that every receipt for money given within the State should bear a duty stamp, value twopence. A Federal officer signed a receipt for his monthly salary, as a Federal Regulation required him to do, and did not affix a State duty-stamp. In some unexplained way, the State authorities became aware of this fact, and caused the officer to be brought before a magistrate on a charge of having contravened a State law. He pleaded that as a Federal officer, signing a Federal document in compliance with a Federal law, he was not bound by the law of the State. The magistrate ruled against him and imposed a fine of one shilling. The State Supreme Court, by a majority, supported the magistrate, and the matter was carried on appeal to the High Court. Counsel for the Commonwealth contended that the State Act was invalid so far as it purported to impose a tax upon a Federal " instrumentality."

Decisions of the Supreme Court of the United States were freely cited in the case. The dictum that " the power to tax is the power to destroy " was repeated. The great figure of John Marshall, the most eminent Chief Justice of the U.S. Supreme Court, strode through the arguments. It might almost be said that he was invited to occupy a seat on the Bench, for the High Court followed his famous judgment in *McCulloch* v. *Maryland*,[2] and laid down the rule that, unless expressly authorized by the Constitution, any State legislation which interferes with the free exercise of the legislative or executive power of the Commonwealth is to that extent invalid and inoperative. This, in abbreviated form, is the Rule in *D'Emden* v. *Pedder*,[3] the first of the leading cases in Constitutional law decided by the High Court.

[1] *D'Emden* v. *Pedder*, 1 C.L.R. 91.

[2] 4 Wheat., 316.

[3] 1 C.L.R. 91.

**The Control of Industrial Relations.**—Within the Commonwealth zone, the State is a trespasser. In 1906 the question arose whether this rule has a reciprocal application. A group of employees of the State Railways in New South Wales applied for and was granted registration under the Commonwealth Conciliation and Arbitration Act. But railwaymen were not all agreed as to the wisdom of this step, and a second group took action which led to the matter being finally considered by the High Court.[1] The personnel of that Court had remained unchanged since the *D'Emden* v. *Pedder* case, and the Court now decided that State railway servants were not subject to the jurisdiction of the Commonwealth Arbitration Court. The decision was very popular. It was considered fair that the Commonwealth and the State should each be supreme on its own side of the fence, with no interference. The symmetry of the Constitution and the acumen and impartiality of the judges were thought to have been demonstrated in a convincing manner. The State Governments were relieved at this escape from the threatened peril to their prestige and to their security. The judicial wall so erected to protect them from Commonwealth encroachments looked permanent, impregnable. But it proved to be nothing more than a Jericho wall, for 14 years later, at a blast from the trumpets of the priests who then sat in the high places of the Law, it fell flat. In more modern terms, the High Court, in the *Engineers Case*, 1920,[2] overruled the decision in the *Railway Servants Case* and declared the employees of the State Governments to be within the jurisdiction of the Commonwealth Arbitration Court. Of the original members of the High Court, which decided the *Railway Servants Case*, two had died and the third had retired. Five Justices were on the Bench in the *Engineers Case*, one of whom, Mr. Justice (now Chief Justice) Gavan Duffy, dissented. The grounds of dissent were chiefly that before Federation the State had undoubtedly possessed the power of controlling the industrial relations between itself and its employees ; that nothing short of an explicit provision in the Constitution (and there is no such provision) could deprive the State of that power ; and that the legislation of the Commonwealth can apply only to subjects and not to the Crown as represented by the State. " In performing the functions allotted to it by the Constitution," His Honour said, " the Crown operating in the State cannot in any way be said to abandon its legislative and administrative powers, or to submit itself to the jurisdiction of the Commonwealth Parliament."

[1] 4 C.L.R. 488.

[2] 28 C.L.R. 129.

The jurisdiction of the Commonwealth Arbitration Court is limited to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," and it may occur to some readers to ask how a court so limited could validly adjudicate in disputes between a State Government and its employees. The explanation is that the tacticians of the trade-union movement soon discovered means of creating disputes in a form, which a complacent court was willing to recognize as interstate disputes. Separate unions in each State connected with a particular industry, *e.g.* State railways, joined in the formation of an amalgamated union, which, as such, obtained registration in the Commonwealth Arbitration Court. Discontent, spontaneous or engineered, arising among any section of, say, State railway employees, in respect of wages or conditions of employment, would be made the occasion of a claim upon the employers, the State Government. If the claim were not immediately granted, the amalgamated union might serve an identical claim upon each of the other State Governments, and apply to the Arbitration Court for a new award enabling them to enforce the claims.

**Industrial Disputes.**—Challenges of the jurisdiction of the Court, by way of appeal to the High Court, have been frequent, particularly on the ground that the "dispute" in question is not a genuine dispute or is not a dispute extending beyond the limits of one State. In some doubtful cases the President of the Arbitration Court has stated a case for the decision of the High Court, but usually it is one of the parties concerned which appeals. The essential issue is generally reducible to something like the following: "On the facts stated is there an industrial dispute within the meaning of the Constitution and of the Arbitration Act?" If the High Court says "Yes," the Arbitration Court proceeds to determine the dispute; if "No," the matter comes to an end.

So long as the three original members of the High Court remained on the Bench, or still constituted a majority (for additional appointments to the Bench were made in 1906 and subsequent years) artificially created "disputes" were viewed with disfavour, and the Court endeavoured to confine the jurisdiction of the Arbitration Court to matters directly affecting employees in the performance of their duties. Later on, with changes in the personnel of the High Court, majority opinion tended to widen the range of "disputes" for the purpose of giving jurisdiction to the Arbitration Court. Such claims were admitted as that, at the demand of the employees, articles made in factories should be marked with the name of the manufacturer, and that officers of trade unions should have the right to inspect factories, examine books, post notices, etc. The connotation of the term "industrial" was also greatly extended to include for example (for the purposes of a justiciable dispute) such public work as that of road making carried out by municipal employees. It was also decided that the work of bank clerks and insurance clerks is an "industry," and the Federal Arbitration Court made awards governing their wages and conditions of employment. It is difficult indeed to say what form of employment would not be held to be an industry. In 1925 the High Court [1] held that employers in an industry are bound by an Arbitration award even though (1) they are not employing any members of the claimant union, or (2) they have no dispute with their own employees, who are quite satisfied with their wages and conditions of employment.

One of the great difficulties of industrial regulation in Australia is the existence of a multiplicity of tribunals, Commonwealth and State. State tribunals possessing jurisdiction to fix wages and conditions of employment were prior in time to the Commonwealth Arbitration Court, and the establishment of that Court did not lead to any diminution in the number of tribunals dealing with the same subjects. In addition to that Court, there are two special Commonwealth tribunals, one controlling wages, etc., of the Public Service, and the other concerned with the coal-mining industry only. The evils of the present overlapping systems have often been commented upon by those entrusted with powers of adjudication. For instance, Mr. Justice Higgins, speaking as President of the Commonwealth Arbitration Court, said in one case :

> This case puts in a glaring light the inconvenience and danger of the constitutional position. Here are two tribunals—one constituted by the Commonwealth and one constituted by the State—handling the same subject-matters independently as if the other tribunal did not exist. There is no co-ordination, no inter-dependence between the courts, and the disputants are only too apt to treat the courts as rival shops. This position involves grave danger to industrial peace, and to the continuity of operations in industries. But I cannot see how the position can be altered without a change of the Constitution.

Mr. President Hewitson of the South Australian Arbitration Court said :

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[1] *Burwood Cinema Ltd. and others* v. *The Australian Theatrical and Amusement Employees' Association*, 35 C.L.R. 528.

There are two Commonwealth awards operating in the same field as the Determination (of the S.A. Court). The resulting complications are chaotic. If it were desired to design such a situation it might be conceived by the disordered mental efforts of a commission of lunatics. Not only are there two living wage rates arrived at by different methods and different authorities, but the very bases of the two jurisdictions also differ.

**The Powers of the Commonwealth Arbitration Court.**—A slight reduction of the overlapping between courts has resulted from an alteration of the law enlarging the powers of the Commonwealth Court in one direction and restricting them in another. The Commonwealth Court has been given power, where it is dealing or is about to deal with a matter, to restrain any State tribunal from dealing, directly or indirectly, with that matter. On the other hand, the Commonwealth Court, when an industrial dispute comes before it, must consider whether the circumstances are such that the issues can most suitably be determined by it or by a State tribunal, and if it thinks the State tribunal the more suitable in the particular case the Court must refrain from proceeding. The parties will then be at liberty to approach the State tribunal if they think fit. A few instances have occurred under both branches of the altered law, but it cannot be said that the evils resulting from the existence of overlapping jurisdictions have been sensibly diminished.

Commonwealth legislation attempted to render the determinations of the Commonwealth Arbitration Court unchallengeable in any other court. But this did not avail to deprive the High Court of power to issue prohibition, in a proper case, against the Arbitration Court, for this right was held to be secured to the High Court by the Constitution itself and to be beyond the reach of the Commonwealth Parliament. Many awards have been set aside as the result of proceedings in the High Court. In some cases prolonged and very costly investigations in the Arbitration Court have thus been rendered nugatory. In order to reduce this waste of time and money, it was enacted that any party in an Arbitration proceeding, before the hearing, may apply to the High Court for a decision as to whether the alleged " dispute " is or is not within the jurisdiction of the Arbitration Court. The number of points arising out of Arbitration proceedings upon which the High Court is invoked shows no sign of diminishing, and in a recent case (October 1931) Judge Beeby of the Arbitration Court complained that the judgments of the High

Court were so numerous and so conflicting that the Arbitration Court did not know where it was.

**Public Finance.**—It is not only in the sphere of industrial relations that State authorities have suffered deep and permanent disappointments from the working of the Federal Constitution. In the vital region of public finance, the States have been reduced to a position of subordination. The High Court decision in the *Engineers Case*, 1920, which brought all State employees within the jurisdictional net of the Commonwealth Arbitration Court, deprived the States of what they had always considered to be their inalienable right to control their own servants. Indirectly it has caused wide uncertainty in their financial forecasts and has added much to their financial burdens. To review some even more direct causes of their financial subordination we must go back a little in the history of the working of the Constitution.

The Constitution provided that for the first ten years three-fourths of the net revenue of the Commonwealth derived from customs and excise duties should be paid to the States. Another section (94) said that "After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth."

The first Commonwealth Government consisted almost entirely of former State Premiers. They had not forgotten the bitter lesson learnt during the financial collapse of the early 1890's, and they began in a modest way by limiting their expenditure and avoiding all extravagance. Also for several years they read s. 94, quoted above, as impliedly directing them to pay to the States, month by month, the whole balance of receipts over expenditure. This balance averaged about £500,000 per annum above the three-fourths of customs and excise revenue which the States were explicitly entitled to receive. This procedure, as it has been officially stated, "crippled the Commonwealth," and when political ambitions expanded and the Commonwealth Parliament desired to develop expensive projects, a way out of the *impasse* was sought.

The course taken was this. In 1908 the Parliament passed two Acts, one dealing with Coast Defence, and the other with Old Age Pensions. Those Acts appropriated unexpended moneys (placed in trust accounts) for expenditure in future years. The Surplus Revenue Act of the same year provided in effect that moneys so appropriated should be deemed to be expenditure of the Commonwealth. Under that legislation certain sums were placed to trust accounts to be expended later on for Coast Defence and Old Age Pensions. If the previous practice had been continued, those sums would have been distributed to the States, and the State of New South Wales brought an action against the Commonwealth[1] claiming a proportion of the money as properly payable to the State, and also asking for a declaration that the Surplus Revenue Act was invalid, as not being within the legislative power of the Commonwealth Parliament. The High Court emphatically rejected both the claims made by the State.

That decision was crucial. The right of the States to the three-fourths of the net revenue from customs and excise was not affected, but that was an expiring right. After December 31, 1910 it would cease to exist. From that date the financial assistance (if any) to be given to the States would be entirely at the will of the Commonwealth Parliament. Henceforth the States would be in the position of suppliants, not masters. The States put forth great efforts to secure a permanently satisfactory arrangement with the Commonwealth and early in 1910 a referendum on the question was held. The electors were asked to approve of perpetual annual payments by the Commonwealth to the States of 25*s*. per head of population. The proposal failed to command the necessary majorities, but shortly afterwards a second Surplus Revenue Act was passed granting payment to the States on that basis for a term of ten years, "and thereafter until the Parliament otherwise provides." Payments at that rate were in fact made until the coming into operation of what is called the "Financial Agreement" between the Commonwealth and the States. That Agreement was brought into temporary operation on July 1, 1927, and (following an enabling alteration of the Constitution and consequent validating legislation) into permanent operation on July 1, 1929. The Agreement is to continue for a period of 58 years, from July 1, 1927. The Commonwealth has taken over the public debt of the States, as existing on June 30, 1927, about £672 millions, and has undertaken to contribute annually throughout the period, towards payment of the interest accruing upon that debt, the sum of £7,584,912. This sum is equivalent to the payment at the rate of 25*s*. per head of population made to the States by the Commonwealth during the financial year 1926–1927. The States undertake to provide the balance of interest payments. This is an obligation towards the Commonwealth, which has assumed the direct responsibility for payment of interest to the bondholders. The Commonwealth will also contribute towards the sinking fund which (at the rate of ½ per cent.) is calculated to extinguish the original debt at the end of the period, and towards the sinking funds to be established in respect of future loans. Further, the Commonwealth contracts to pay interest at 5 per cent. (instead of the 3½ per cent. previously paid) in respect of the value (nearly £11 millions) of properties transferred to the Commonwealth by the States.

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[1] 7 C.L.R. 179.

The Agreement sets up a Loan Council—on which the Commonwealth and every State is represented—for the control of borrowing. This of course entails some surrender of individual independence on the part of each Government represented, but secures a gain in stability. The obligation on all States to keep up sinking-fund payments at specified rates is an important step in the direction of sound finance. New South Wales had almost entirely neglected this duty, and in some other States it had received inadequate attention.

On the whole the Agreement must be regarded as a great gain to the States. In the absence of some such agreement, it is almost certain that the Commonwealth would soon have reduced or altogether discontinued the *per capita* allowance of 25*s*., and the loss of this assistance would have been seriously felt. It is true that the basis has been altered so that if the population continued to grow at something like the pre-existing rate of 2 per cent. per annum, the total payments to be made by the Commonwealth during the 58-year period would be considerably less than they would have been under a continuance of the old basis, but there was no hope of that basis being made permanent. In view, however, of other contributions to be made by the Commonwealth, the States will be direct gainers during the earlier part of the period; and if a recently announced decline in the rate of population increase should prove to be a permanent decline, the States will benefit to a previously unexpected extent. The States have also acquired a valuable advantage on another plane. The adoption of the Financial Agreement, with its establishment of the Loan Council, has restored to the States, *vis-à-vis* the Commonwealth, a prestige which had become seriously impaired. The real financial paramountcy had previously, and finally, passed to the Commonwealth, but the States have regained a certain financial security and an apparent equality of status. The financial paramountcy of the Commonwealth is secured by its exclusive power to impose customs and excise duties, and by its overriding supremacy in the field of direct taxation. The exclusive power to impose customs and excise duties gives a complete control over imports and exports. This extends to absolute prohibition or to the imposition of onerous conditions. The Scullin (Labour) Government, which came into office in October 1929 (and was defeated in December 1931), made an unprecedented use of the power to prohibit imports absolutely, and also raised to almost prohibitive heights the duties on a long list of items.

In the sphere of direct taxation, there is no limit to the power of the Commonwealth Parliament, except that it is forbidden to discriminate between States or parts of States. Although up to the present the States have been permitted to exercise concurrent powers *e.g.* as to income-tax and land-tax, the Commonwealth Parliament, either by direct or by indirect means, could, if it chose, deprive the States of those powers or render them completely ineffective. The Commonwealth is under no obligation to assist the States except so far as it binds itself by voluntary agreement (as under the Financial Agreement above mentioned), or as an act of grace commits itself to the rendering of specific financial assistance. In some such " acts of grace " the graciousness has been obscured by the imposition of restrictive conditions.

In 1931 a very difficult situation arose with regard to the Financial Agreement. The Lang Government in New South Wales deliberately defaulted in payment of interest upon certain overseas loans. The Commonwealth Government met the obligations to the bondholders, and, as there was no prospect of voluntary reimbursement by the State, the aid of the Commonwealth Parliament was invoked. An Act called the Financial Agreements Enforcement Act was passed which gives power to the Commonwealth to secure reimbursement in such cases even against the will of the defaulting State. Moneys lying in any bank to the credit of the State may be attached, and, subject to certain preliminary formalities, it is made compulsory for State tax-payers, in any prescribed class of taxation, to pay to the Commonwealth all sums which would otherwise have been payable to the State. Any payment to a State authority in contravention of this direction is made an offence, and the tax-payer so offending does not thereby obtain any release from or reduction of his liability to the Commonwealth. The Act also makes it an offence for any State Minister or other person purporting to act on behalf of the State to do any act which may hinder or interfere with the collection of such moneys by the Commonwealth.

The State Government of New South Wales took action against the Commonwealth in the High Court and sought a declaration that the Act in question was invalid. By majority, 4 to 2, the Court upheld the validity of the Act.[1] An application by the State for leave to appeal to the Privy Council was unanimously refused.[2]

The State Government declared its intention to ignore the judgment of the High Court, and took specific steps to defeat the operation of the Commonwealth Act. It withdrew the whole of its balances in the banks and stored the money in the State Treasury. It also issued a circular to its officers in effect ordering them to disobey and in every way to circumvent the Commonwealth law. The State Governor, Sir Philip Game, discussed the matter with the Premier and suggested the withdrawal of this manifestly illegal circular. Mr. Lang, both verbally and in writing, refused to withdraw the circular, and the Governor, acting under his undoubted prerogative powers as representative of His Majesty the King, at once dismissed his advisers, Mr. Lang and colleagues.

Immediately afterwards, Mr. B. S. B. Stevens, the leader of the Opposition, was sworn in as Premier. He formed a provisional Government, and made arrangements for a general election at the earliest possible date. At that election a few weeks later, the Lang party was overwhelmingly defeated. Apart from the importance of this event from the point of view of the maintenance of the Constitution, it put an end to the riotously unsound finance of the Lang Government which was menacing the solvency of Australia. The Stevens Ministry announced a policy of friendly co-operation with the Commonwealth, and the operation of the Enforcement Act was at once suspended.

**The Position of the Privy Council.**—The story of the relations between the Commonwealth and the Privy Council (the Judicial Committee) is not encouraging to those who value every link which binds remote Australia to Britain. We have seen above how the first Justices of the High Court spoke of the Judicial Committee in connexion with questions arising out of the Australian Constitution. They said, in effect, or in so many words : The Australian Constitution is in substance a copy of the Constitution of the United States ; it is to be interpreted chiefly by the light of American decisions ;[3]

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[1] 46 C.L.R. 155.

[2] 46 C.L.R. 235.

[3] In the *Engineers Case*, 1920, the High Court took a much lower view of the value of American decisions, as guides to the interpretation of the Australian Constitution.

"the Constitution of the United States is a subject entirely unfamiliar to English lawyers"; and therefore the Judicial Committee is not qualified to act as the final tribunal in Australian Constitutional questions.

A glance at some preceding events will give an idea of the atmosphere at the time. In an earlier case, known as *Deakin's Case*,[1] the High Court had held that a State Parliament could not validly impose income-tax upon the salary of a Federal officer. In a second case, *Outtrim's Case*,[2] where a State was again endeavouring to enforce payment of income-tax upon the salary of a Federal officer, the State Supreme Court, following the decision of the High Court in *Deakin's Case*, ruled that the State claim was unenforceable. Counsel for the State applied for leave to appeal to the Privy Council, and the Supreme Court granted leave, on the ground that the Constitution had not affected the pre-existing right of appeal direct from State Supreme Courts. (When the Constitution Bill was being debated in the Imperial Parliament, the Attorney-General assured the House of Commons that this right of appeal could not be affected.) The Judicial Committee, without formally granting leave to appeal, heard argument in the case and gave judgment allowing the appeal and declaring *ultra vires* a provision in the Federal Judiciary Act which purported to take away the right of appeal from a State Supreme Court to the Privy Council.

The Constitution provides that where the High Court has adjudicated in a cause involving the respective limits of power of two or more of the several Australian Governments, no appeal lies to the Privy Council unless the High Court certifies that the question is one which in its opinion ought to be determined by the Privy Council, or, to use the statutory term, by His Majesty in Council. In any matter not coming within that restrictive provision, the right of the Privy Council to grant special leave to appeal is declared by the Constitution to be unimpaired.

To the question whether a State Parliament can validly impose income-tax upon the salaries of Federal officers, the High Court in *Deakin's Case* had said "No"; the Privy Council, in *Outtrim's Case*, had said "Yes." That was the position when the High Court dealt with *Baxter's Case* (where the facts were similar to those in *Outtrim's Case*), and refused to follow the decision of the Privy Council. *Outtrim's Case* had reached the Privy Council by a track which did not pass through the High Court, a track which the

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[1] 1 C.L.R. 585.

[2] 4 C.L.R. 356.

Commonwealth Parliament and the High Court have been at some pains to close.

The Commonwealth Parliament, lacking power to prevent appeals to the Privy Council by direct prohibition, resorted to what have been judicially described as roundabout methods. Certain provisions of the Constitution enabled Parliament to invest State Courts with Federal jurisdiction, and also to define the extent to which the jurisdiction thus conferred shall be exclusive of that which is otherwise vested in the courts of the States. There are nine possible subjects of Federal jurisdiction, as enumerated in ss. 75 and 76 of the Constitution. The device adopted by the Parliament in the Judiciary Act was first to deprive the State courts of jurisdiction in respect of those nine subjects and then to invest them with Federal jurisdiction over the same field. The object of this otherwise meaningless taking-away and giving-back was to attach conditions to the jurisdiction so given back, and one of the provisions inserted for this purpose purported to prevent appeals from State courts when exercising Federal jurisdiction except to the High Court—that is, to cut away the possibility of appeal to the Privy Council. This was the provision which the Privy Council in *Outtrim's Case* held to be *ultra vires* and void. At least, no one then or for many years afterwards seems to have doubted that this was the intention and effect of the Privy Council judgment. As late as 1921, in the *Lorenzo* v. *Carey*[1] case, six Justices of the High Court agreed that the judgment was to be so interpreted. But a little later, in *Kidman's Case*,[2] three of the five justices then sitting, reversing former opinions, said that " on being *carefully* examined " (the implication is rather amusing) " the judgment in *Outtrim's Case* does not establish the invalidity of s. (39) (2) (*a*)," (the provision in question).

The Victorian Supreme Court, however, continued to regard the *Outtrim* judgment as preserving the former right of appeal from State courts to the Privy Council, and in more than one case that Court granted leave for such an appeal. But, on application by the opposing party, the High Court, in each such instance brought before it, has quashed the order of the Supreme Court granting the leave to appeal. The result of the cases at present seems to be that if a State Supreme Court grants leave to appeal to the Privy Council, the order of the Court, whether it was exercising " Federal jurisdiction " or non-Federal jurisdiction, is liable to be, and almost

[1] 29 C.L.R. 243.

[2] 35 C.L.R. 69.

certainly will be, set aside by the High Court. The Committee of Counsel of Victoria, in evidence given before a Royal Commission, 1929, commenting upon this situation and upon the anomalies of " Federal jurisdiction " as exercised by State courts, said :

> However effectual such provisions (those above discussed) may be for ensuring that the High Court retains an almost exclusive authority to declare the meaning and effect of the Constitution, no one can fail to see that this is done at the expense of rendering almost futile and impossible the practical administration of justice for the purpose of adjusting the real controversies between subject and subject, or redressing real grievances which a subject may have against the Crown.

**Freedom of Trade and Intercourse.**—Unrestricted freedom of trade and intercourse between the States was one of the chief aims of Federation, and s. 92 of the Constitution says that " trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free." Freedom of personal intercourse and of access to any part of the Commonwealth " independent of the will of any State " was established by a judgment of the High Court, given nearly twenty years ago,[1] which has not since been challenged. But the Justices of the High Court, " whose lot it is to explain the elliptical and expound the unexpressed " (as one of them has said), have found great difficulties in assigning limits of meaning to the expression " absolutely free " as applied to trade and commerce. The Committee of Counsel of Victoria, in the course of comment upon s. 92, have said :

> In terms it does not refer to State or Federal Parliaments, nor indeed to legislation at all. If, however, it intends to include the Commonwealth in its prohibitions, there appears to be an opposition between a provision which says that trade and commerce among the States shall be absolutely free, and the provision of s. 51 (*i*) which says that the Federal Parliament may make laws with respect to trade and commerce among the States. If " free " means free of all legal restrictions, and the provision applies, as its terms seem to make it, to the Commonwealth, it would follow that the Federal Parliament's power to make laws in relation to interstate trade did not include the enactment of any restrictive law at all. This has led to the argument that either the word " free " must mean free of something less than all legal restriction or else the provision cannot apply to the Commonwealth. The High Court has now adopted the latter of these alternatives.

If, as the High Court now holds, the section in no way applies to the Commonwealth, there would seem to be no constitutional safeguard against the imposition by the Commonwealth Parliament of some system of charges upon the interstate passage of goods which would effectively destroy interstate free-trade.

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[1] *R.* v. *Smithers, ex parte Benson*, 16 C.L.R. 99.

**The Limitations of the Constitution.**—Thirty years' working of the Australian Constitution has shattered many illusions and has shown how defenceless are the States against the dominating and strongly asserted supremacy of the Commonwealth. The major financial and industrial disappointments of the States have been discussed above. One previously unmentioned mark of their subordination is their compulsory submission to the payment of customs duties upon all State imports. The question is of less financial importance than it was in the earlier years, as the development of Australian industries, particularly in the iron and steel trades, has reduced the need for importation. In 1907 the State of New South Wales tested in the High Court the right of the Commonwealth to enforce payment of customs duties by a State.[1] The Court declared the claim of the Commonwealth to be valid. State Governments regard it as politically "immoral" that the Commonwealth should seize a part of one of their loans (for it is generally in connexion with some railway extension or other public work financed by loan that the importation is made) and treat the amount as Commonwealth revenue.

The high-tariffism to which the Commonwealth Parliament has long been committed, whatever benefits it may confer upon the two largest States, is a cause of constant and quite unexhausted complaint by the smaller States, particularly Western Australia and Tasmania. They regard themselves as bearing all the burden of high protection without being able to reap any of the accompanying advantages.

But if the States have suffered many reverses under the Constitution, the Commonwealth has often found itself fettered by limitations (more or less unexpected) upon its legislative and executive power. Some of the statutes to which it attached considerable importance have been declared by the High Court to be wholly or partly invalid. Some of the Acts it would like to pass are barred by a known inadequacy of power. The Parliament cannot for instance pass a valid company law. Nothing would seem more consonant with the idea of Federation, and nothing would produce more practical benefits, than that the whole range of legislation affecting trade and commerce should be uniform throughout the Commonwealth. But the Constitution has been perversely designed to prevent this. A few branches of commercial law such as bankruptcy, bills of exchange, patents and copyrights, have been specifically included in the Commonwealth legislative power; but in respect of the great residue of legislation affecting internal trade and commerce, including shipping and navigation, the Commonwealth Parliament must confine itself to interstate trade, leaving out the whole volume of intrastate trade. Many absurd and costly difficulties have arisen from this restriction. Even on the commercial side, the Commonwealth Parliament has left unused one or two specific grants of legislative power. More vital still is its omission to use its unrestricted power of legislation in respect of marriage and divorce. Its inaction in this field leaves many social wrongs unredressed.

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[1] *The Attorney-General of New South Wales* v. *The Collector of Customs for New South Wales*, 5 C.L.R. 818.

A movement for the partition of the State of New South Wales into three separate States appears to be gaining strength, and has the avowed support of the present Government of that State. Any such partition would inevitably increase the authority and influence of the Commonwealth, for the Commonwealth Parliament has in effect the power to prescribe the Constitution of any new State which it thinks fit to admit into the Commonwealth.

The Labour Party has for several years had among its " planks " the resubdivision of the five Australian mainland States into a dozen or more " provinces." This proposal involves the transformation of the Federation into a form similar to that of the Union of South Africa, where the provincial administrations exercise only those powers allotted to them by the Union Parliament.

A Federation of the present Australian type is a forcing-bed of litigation, and what the Constitution is at any given moment depends upon majority opinion in the High Court. With or without changes in the personnel of that Court, reversals of opinion on matters of the first importance have occurred, and perhaps inevitably will occur. In industrial affairs, the legalism of arbitration tribunals (with frequent appeals to the High Court) keeps the parties always at arm's length, and tends to harden class-consciousness into an adamantine wall of separation. Incessant litigation, which at best creates a kind of armed peace, is called the reign of law.

In fact, the millennium has not yet arrived in Australia, though happily there are buoyant souls who think that it is on the way.

# TRUSTS AND THE CIVIL LAW.[1]

[*Contributed by* Me. Pierre Lepaulle, *Paris.*]

In order to determine how civil law rules of international private law apply to a foreign legal technique, it is necessary first to find out what is the nature of that foreign technique taken in itself. Hence, if we want to know what civil law courts will do with an Anglo-Saxon trust, we must first know what a trust is, or at least what our courts will understand a trust to be. That preliminary task is, indeed, far from being easy.

**Basis of a Trust.**—Your legal history, the opinions of your courts and your textbooks seem to demonstrate that trusts are essentially based on the distinction between law and equity. As such a distinction is practically unknown to all legal systems except the Anglo-Saxon, one would conclude that trusts are not made for exportation and cannot have any effect or any meaning outside of Anglo-Saxon jurisdictions. For instance, a trust on real property located in France should be considered as void, since French lawyers have no idea of what an equitable title may be.

If, however, one confronts those conclusions with the facts, one realizes that they are in contradiction with them. Trusts have ceased to be confined within the boundaries of English-speaking countries and have an ever-increasing international importance. Testators frequently leave property located on the Continent in trust ; American companies desirous to get trust business establish offices in Europe ; testators in an attempt to reduce the burden of taxes for their legatees create trusts abroad ; foreign banks in order to attract capitalists offer for sale investment trust certificates the whole world over. The bank of International Settlements has been created by the Young Plan signed in a civil law country, it functions in another civil law country and is trustee for countries the majority of which are civil law countries.

We are therefore faced with an apparent contradiction. In order to determine whether that contradiction is only apparent, and not real, we must examine juristic facts. What I mean by "juristic facts" are the results actually reached by legal decisions and statutes in force. Mainly because of the doctrine of *stare decisis* and of the spirit of the common law, judges use the same words, the same method of approach, the same line of reasoning as their predecessors, even when they reach an entirely new result. Opinions of courts must not then be taken at their face value, their real value being conditioned on their direct connexion with the solution reached.

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[1] Address delivered by Me. Pierre Lepaulle, A.M., LL.D., S.J.D., of the Paris Bar, before the Law Faculty of London University, February 3, 1932.

As textbooks are made as a guide for the practitioner, text writers seem to feel bound to use the same language as the judges. There is, therefore, in Anglo-Saxon law a part of its legal literature which has only a symbolical value. If one wants to know what the law is, one must take as the only source of law the results reached and not the language used.

Such a method of approach obliges us to set aside all problems relating to jurisdiction or procedure: it is of no significance, for instance, that a certain result can be reached in a court of law if a court of equity can enjoin the plaintiff from enforcing his judgment. The only thing that matters is the final legal result that can be reached.

Such a method is in accordance on the one hand with the contemporary evolution of legal systems toward a general internal unification, and on the other hand with the tendency of Anglo-Saxon law towards a progressive disappearance of the line of cleavage between law and equity.

If we take our basis on "juristic facts," we must not leave aside any relevant ones. We must then consider all trusts: whether express, resulting or constructive, whether private or public. If we do so, we cannot avoid reaching the conclusion that the trust is not what it is said to be in the English and American legal literature. Text writers and judges say that a trust is a legal relationship between trustee and cestui, but courts hold that a valid trust is created even if no trustee is appointed and if the trust is charitable—a strange relationship indeed when there are no parties between which it can be established! Again, legal literature states that a cestui must be a person or a legal entity when the trust is not charitable, but the fact is that trusts to say masses for the soul of the testator are valid although not charitable. Again, the trustee is said to be the owner of the *res*, but he has not one of the essential elements of ownership: he cannot rent or sell the *res* for his own benefit, he cannot destroy it, neither his heirs nor his creditors can entertain any hope of getting anything out of it. Again, text writers and judges state that equity acts only *in personam*, but the fact is, that the cestui can follow the *res* in the hands of certain third parties. Many other examples could be given. These are sufficient to show that legal literature is more unreliable in the field of trusts than in any other. If we content ourselves with the examination of juristic facts, what do we see? In order to have a valid trust two elements only are essential: a *res* and an appropriation. The *res* must be composed of rights. Now, rights are of two kinds, those which are essentially personal (as the civic rights, the rights of a father over his child, right to wear a decoration, etc.) and those which are not linked to the person: property rights. These last alone can form a *res*. So a trust can be formed only with rights which can be disconnected from the person.

Moreover, the *res* is, in fact, disconnected from any person. It has ceased to form a part of the assets of the settlor. It is not part of the assets either of the trustee or of the cestui.

That is not all, however; the different items which compose the *res* are not only segregated, they are, so to speak, all bound together, they are made into a unit, so that if one of the items is sold, the purchase price takes naturally its place in the unit. Such an aggregate of property rights and liabilities which has no definite name in English is what the civilians call "a patrimonium." Every individual, every legal entity has a patrimonium. Now, the *res* of a trust presents this extremely striking feature that it is a patrimonium which, instead of being crystallized around an individual or legal entity, owes its unity to the end to which it is devoted, *i.e.* to its appropriation.

A trust without appropriation (a dry trust) cannot live.

The appropriation must be objectively determinable, since if it were not so, no court could supervise the trust. However, the appropriation does not need to be made in favour of an individual or of a legal entity. Hence, charitable trusts, trusts which are not at all charitable but have been called so by judges, trusts for saying masses, for erecting monuments to the settlor in a private park, for the greyhounds and ponies of the settlor, etc., are recognized as valid.

We therefore reach this conclusion, that if we leave aside questions of procedure and consider only the actual results reached by the court, an Anglo-Saxon trust appears to be, at least to the civilian, a patrimonium appropriated to a certain end.

Such a definition immediately raises for us a grave problem: is not the idea of appropriated patrimonium so foreign to our conceptions that the trust must be refused in all cases a right of entrance in civil law countries? One might, perhaps, at first glance, be astonished at such a question and say that the definition of trust has, after all, nothing revolutionary in itself. At the second glance, however, one cannot fail to realize that such definition is quite bold for this reason: If a patrimonium can exist by itself, simply because it has received an appropriation, it means that assets can exist without being owned by anyone, hence, that rights may exist without being vested in someone.

If a house, for example, is put in trust, nobody owns it any more. The trustee certainly does not own it: he cannot destroy it, he cannot either sell or lease it for his own benefit. He cannot transfer it to his heirs or legatees; his creditors have no rights to it, so none of the elements of ownership exists in his favour. As to the cestui, he certainly does not own the house either. Whatever may be the nature of the cestui's interest, it is certainly not the ownership of the house. If, then, the right of ownership is not linked to an individual or a legal entity, it must be, so to speak, suspended in the air. Now the question is this: can the civil law recognize a legal technique in which rights are not vested in anyone but are appropriated to certain ends? If an outsider were to content himself with reading civil law literature, he would probably come to the conclusion that the answer is, "no." If one, however, looks at juristic facts as they stand in civil law countries, one canot avoid answering "yes!" We will demonstrate it by two examples; several others could be given.

What we call *fondation* is officially said to be a gift or legacy with a charge, the donee or legatee being the owner of the property given or devised. If one, however, considers the actual results reached, one readily sees that the donee or legatee is about in the same situation as the trustee, that he has none of the elements of ownership, that the *fondation* is very similar to a charitable trust and that its *res* is not really owned by anyone, that it is simply appropriated to the realization of a certain purpose.

Again, it is repeated that a man put in bankruptcy by a civil law court remains the owner of all his assets; but if one examines juristic facts, one cannot but conclude that the bankrupt remains the owner of a very small portion of his estate; so far as the rest of his assets is concerned he is deprived of all the essential elements of ownership, most of his property rights are segregated from his person in order to be appropriated to the payment of his debts.

Those two illustrations show that the idea of appropriated patrimonium—hence of a trust—has nothing contrary to the civil law conceptions. If the Anglo-Saxon trust cannot then be, *a priori*, rejected from civil law countries, it must be admitted under certain circumstances. What are those circumstances? That is the whole problem of the principles of international private law which are applied to trusts. It must be clear that it is impossible to lay down here all those principles. All that we can do, and all that we will try to do, is to tackle the main difficulties which civil law courts will encounter in the application of principles of private international law to trust. (I say "private international law," and not "conflict of laws" because the latter is only a part of the former.)

**Domicile and Nationality of a Trust.**—The first of those difficulties relates to jurisdiction *ratione personæ*. In order to understand where the difficulties lie, one must know that there exists two most important general principles in our procedure: (1) that a case must be brought before the court of the domicile of the defendant, (2) that a French citizen can always sue in France a foreign defendant, even if the latter has never been in France and is not served with process within the jurisdiction. Hence, the two essential elements so far as jurisdiction is concerned are domicile and nationality.

Civil law courts will then have to solve the problem of the domicile and of the nationality of the trust. One readily sees how delicate that is, and is tempted to make the following objection: "The legal concepts of domicile and nationality necessarily involve the idea of an individual or a legal entity. The gist and the origin of the idea of domicile is the home, and how can you have a home when nobody lives in it and sits by the fireplace? Nationality supposes allegiance; how can we have allegiance when there is no subject to kneel before the Sovereign?"

Such objections are striking but do not resist the test of analysis. The notions of domicile and nationality have been applied to corporations without difficulty. Why? Because they carry legal consequences not only for the person but also for property rights. Those latter consequences alone will flow where there is no person. A corporation can be French without being called under the colours when it is twenty years old! Moreover, there is no choice: as we cannot solve most problems of jurisdiction without determining the nationality or the domicile of the litigants, we have to find for trusts engaged in a suit a nationality and a domicile.

How, then, are we going to determine the domicile of a trust? The *lex fori* will of course determine it according to its own principles. So our courts would follow their usual theory on that point and hold that the domicile of a trust is the place where its administration is normally centred. That place is usually determined, at the creation of the trust, by the intention of the settlor and, later, by the trustee. The domicile of the trustee is independent of that of the trust: it may be, for instance, at his country home, while that of the trust will be at the business office of the trustee. That idea, indeed, is not foreign to English and American law which, without using the word "domicile," lays so much stress on the "place of administration" in cases of conflict of laws.

The problem of the nationality of a trust is more delicate to solve. Our judges will have a free hand as there is practically no law on the subject. Indeed, although a few American cases state that a trust is a citizen entitled in certain respects to the protection of the Federal Constitution, they fail to decide how that citizenship is determined. Four solutions seem, *a priori*, possible: the nationality of the State under which laws the trust was created, that of the cestui, that of the trustee and that of the State where the trust is domiciled.

The first solution is unsound (although often applied, in common law countries, in corporation law). A trust to be administered in England for English cestuis should certainly not be considered as an American trust because it was created under New York law.

The second theory (nationality of the cestui) is impossible to adopt because in many trusts there will be no definite beneficiary (what would be the nationality of the Carnegie Trust for the establishment of a permanent peace in the world?), or the nationality of the cestui will be unascertainable (as is the case when the beneficial interest is evidenced by bearer certificates).

The third theory (nationality of the trustee) cannot be justified on any sound reason since the trustee is nothing but the servant of the trust, is not essential to its existence and can be replaced many times during the life of the trust.

It seems, then, that civil law courts should and probably will adopt the fourth solution: the nationality of the trust will be the same as that of the State of its domicile. That theory is already adopted in our corporation law. It is not only sound on principle, but also from a practical point of view since it avoids all possible conflicts between nationality and domicile.

**Jurisdiction Ratione Materiæ.**—The second problem raised by trusts under the civil law relates to jurisdiction *ratione materiæ.* Courts of Equity act as the advisors and the controllers of the trust. A civil law court cannot assume such a function : it is inconceivable for a civilian that a court may allow a trustee to keep certain securities or may select a new trustee. If, therefore, a trust is created to function normally in a civil law country, the settlor will have to provide for an organism invested with the powers of supervision, control and advice which equity courts have in Anglo-Saxon countries.

**Delimitation of the Law of Trusts.**—The third problem is that of the delimitation of the law of trusts. Many questions of law under the Anglo-Saxon legal system are considered as mere questions of fact under the civil law. The theory of *stare decisis* mixes law and facts so intimately that your textbooks appear to us as overburdened with concrete cases which are, according to our notions, mere classifications of facts. How will civil law courts draw the line between facts and law ? The answer can leave no doubt : our courts will draw the line where they are accustomed to draw it. They will, for instance, refuse to consider as law decisions like *in re Hallet's* case which states how to follow the *res* and trace its identity through its different changes. Our judges would not let a barrister quote precedents stating whether a trustee is negligent under certain definite circumstances and would hold that negligence is only a question of fact. The realm of facts being much wider under our system will then increase in great proportion the scope of matters that will be decided by the *lex fori.* The absence of recognition of the doctrine of *stare decisis* on the Continent will have this consequence, that a substantial part of what you include in the law of trusts will melt in crossing the Channel.

**Theory of Qualifications.**—The fourth problem relates to the so-called "theory of qualifications." To my knowledge, the word "trust" does not appear in any French statutes ; many provisions of our law, however, regulate situations which are usually taken care of by the creation of trusts in common law countries. Could it be said that no regulations being passed concerning trusts, no statute could limit their operation ? Certainly not ! Judges and administrative authorities must adopt a functional point of view and hold that when a trust fulfils in its own country the same function as a legal institution regulated by statutes, they will impose on that trust the limitations provided for by the statute.

The application of that principle is sometimes difficult. For instance, in December 1931 the Paris Court had to determine whether an investment trust certificate fell under certain regulations applicable to debentures and shares. It finally held—wrongly, I believe —that those regulations did not apply.

**Conflict of Laws.**—Last, but not least, is the problem of conflict of laws proper. As I have stated in the beginning, it is necessary, before applying rules of conflict of laws to a foreign legal technique, to determine what that technique is in itself. We have, indeed, done part of that work since we have endeavoured to find out what would be, according to a civil law court, the nature of a trust. You remember that we came to the conclusion that a trust was an appropriated patrimonium, that such a notion had nothing repulsive to our conceptions and that therefore there was no *a priori* reason to reject trusts from civil law countries.

Now that we know that trusts may land on Continental Europe, and that rules of conflict of laws will have to be applied to them, we must complete the study started at the beginning. We determined, at that time, the nature of a trust, we must now find out what may be called the "structure" of a trust, *i.e.* the individual rights and liabilities created by a trust. When that has been done, our courts will have a clear picture of what the foreign technique is and the problem of the application of conflict of laws principles will be considerably simpler.

Three main problems must be answered in order to determine the structure of a trust.

**Legal Obligations of the Trustee.**—The first one consists in finding out towards whom the obligations of the trustee exist. It is usually said that they exist towards the cestui. That answer is, indeed, a consequence of the idea that a trust is a legal relationship between trustee and cestui. Here again, however, legal literature does not fit in with juristic facts for the simple reason that a trustee has also obligations—and practically the same ones—when the cestui is not a person or a legal entity.

Towards whom do the obligations of the trustee exist in a charitable trust, in a trust for saying masses, or for the upkeep of a private monument ?

It is true that certain persons may be vested with the power to supervise the trust and to force the trustee to perform his obligations, but that is not the question. We must find rights corresponding exactly to those obligations, as an obligation is, according to its etymology and legal meaning, a link. Legal literature is therefore wrong when it states that the obligations of the trustee exist towards the cestui, since such theory is unable to explain a substantial number of the cases.

Then, if the legal obligations of the trustee do not exist towards the cestui, who has the rights corresponding to such obligations ? It cannot be the settlor, since he has no rights against the trustee if he has not expressly reserved any in his favour in the trust deed. It cannot be the court, since it is not a legal entity and cannot have private rights. We have then no choice : the obligations of the trustee will be taken by civil courts to exist towards the trust itself. Civil courts should therefore decide that to those obligations correspond rights which do not belong to anyone but are—as all the other assets composing the *res*—appropriated to a certain end. Such a solution is the only one which is in harmony not only with the true nature of trusts but also with actually decided cases in England and America. How otherwise could be explained not only charitable trusts, those for saying masses, etc., but also those in which the trustee is under the obligation to select who is going to be the cestui or not to give too much of the income to the beneficiary under a discretionary trust ?

**Nature of the Cestui's Interest.**—The second main difficulty that one has in finding out what rights are created by a trust is to determine the nature of the cestui's interest. One readily understands that if it is a right *in rem*, the solution of conflicts of laws will not be the same as if it is a right *in personam*. That will be, indeed, a hard question to solve, since English and American text writers have never been able to solve it for good. Our judges will have to take sides in that long-drawn fight. They will, in my opinion, decide that the cestui's right is only and always *in personam* for the following reasons : If I own a house and put it in trust, I have appropriated the full and unincumbered ownership of the house to certain purposes ; the most absolute property right has ceased to belong to me and becomes subject to an appropriation but remains nevertheless the same absolute right *in rem*. If a trust is an appropriated patrimonium, the creation of a trust does not involve any change in the nature of the rights which form the *res* : the property right which I put in trust remains exactly the same property right after the formation of the trust as it was before, the only difference is that the right ceases to be vested in an individual or legal entity, but stands by itself and has a status determined by its appropriation. Hence, if the most absolute right *in rem*, *i.e.* full and unincumbered ownership, is put in trust there is no place left for the slightest additional right *in rem* to give to the cestui.

If the beneficiary has no right *in rem*, his right must be *in personam*.

**The Cestui's Rights.**—Having reached that conclusion, civil courts will have to decide against whom does the cestui's rights exist. It cannot be against the trustee, since we have shown that the latter's obligations are not to the cestui but to the trust itself. It is clear that if the trustee has no obligation towards the cestui, the cestui can have no rights against the trustee. The cestui's rights, however, cannot stand up in the air, they must correspond to definite liabilities. Civil law courts should hold then that the cestui's rights exist against the trust itself.

One could, indeed, make three objections to such an opinion. The first one may be formulated as follows : " It is understandable that rights may be appropriated to certain ends, because they constitute assets, but how is it possible to appropriate liabilities ? " It is true that the *res* cannot be composed only of liabilities ; there must be something substantial to appropriate. But that "something" substantial must be appropriated, and the legal necessity of appropriation may very well be a charge bearing on the patrimonium itself : the patrimonium which is a whole, a working capital, which, because it works, incurs liabilities.

The second objection is that if the cestui has no right against the trustee, how is it that he can sue him if he does not get what he is entitled to ? The answer is clear : the cestui can sue the trustee for two reasons : (1) the trust is represented by the trustee, who is the only one who, as a matter of procedure, can be sued for all the obligations of the trust ; (2) the trustee is, as a general rule, personally liable for all the obligations of the trust, so that the cestui can reach him through the trust.

Finally, one could make this objection : " How is it that a cestui can, in many cases, sue third parties if he has only a right *in personam* against the trust ? " It might perhaps be answered that if I have a right *in personam*, under a contract for example, against B, such right may give me in several instances a good cause of action against X. Such is the case if X induces B to break the contract, if B subrogates me to his rights against X, if B is insolvent and has as only assets a claim against X, etc. Such an answer would not, however, go to the bottom of the problem for this reason : when the cestui acts against third parties, it is not his own rights which he is enforcing, but the rights of the trust. The proof is that his right of action against third parties is not limited to his own interest. He may have, for example, a right to a small part of the income and nevertheless sue a third party for the whole capital of the *res*. If, therefore, his right of action is much wider than his right against the trust we are obliged to conclude that when he acts against third parties he does so, so to speak, as the guardian of the trust, in stepping into the shoes of the defaulting trustee, because of a power given to him by law to act for the trust and not because he can be considered as having a right *in rem* good against the whole world.

We may then be satisfied that none of these objections are sound and that the right of the cestui should be considered under civil law rules of conflict of laws as a right *in personam* against the trust.

**Application of Rules of Conflict of Laws.**—When our courts shall have determined the rights and liabilities created by a trust, they will be in a position to apply correctly the rules of conflict of laws.

Such application, however, raises several main difficulties which we shall briefly consider.

1. *Requirements of substantive law for the creation of a valid trust.*—An *inter vivos* express trust is created by the expression of intention of the settlor alone : the acceptance by the cestui is not a condition precedent to the existence of the trust. Civil law courts will then have to pass on a question which is the subject of much controversy in our countries and may be formulated as follows : Can one be bound by the mere fact that he has expressed his intention to be bound ? Is it not necessary that someone else should accept his proposal or at least act in relying on such expression ? Is it possible, under the civil law, that I bind myself legally by my own signature, before anyone accepts the contents of my deed ? That is the famous problem of the legal value of what we call "unilateral will." Many text writers of the old classical school are still of the opinion that one will cannot bind itself, that two minds, that of the obliger and that of the obligee, must meet in order to create juristic consequences. If one, however, examines the reasons given, one realizes that those text writers only think of legal trans-

actions between individuals or legal entities. It is, of course, natural that if A makes a contract with B or transfers property to him, there must be an expression of intention manifested both by A and B. But if A segregates some assets from his own patrimonium, gives to those assets a status and appropriates them to a certain end, there is no one else but A who can express his will, and there is nothing against our public policy which would prevent giving effect to A's will on the sole ground that his mind does not meet with another mind. Such marriages of minds are not a condition precedent to the birth of a legal institution : if testaments can be valid by the expression of intention of one person, why should not an express *inter vivos* trust be valid under the same conditions ? Why should we die before seeing our intentions respected ? The validity of *inter vivos* trusts cannot therefore be *a priori* rejected by civil law courts because they are created by the expression of intention of the settlor alone.

Trusts may then be considered as valid or not according to the law which is going to pass on their validity. Which is that law ? One must make a distinction between *inter vivos* and testamentary trusts.

One knows that English and American courts have rendered very confused decisions on the point of determining the law which must pass on the validity of *inter vivos* trusts. How should civil law courts tackle the problem from the point of view of their own rules of conflict of laws ? They should take into consideration the law of the place where each item of the *res* is located when the trust is created. If a transfer of title from A to B must be valid according to the law of the *situs* of the property, the same must be true for the creation of a trust which always involves a transfer, even when the settlor is the sole trustee, since a trustee can in no way be considered as an owner, in the field of conflict of laws.

The law which the settlor has had the intention to adopt must also be considered, since the principle of what we call "autonomy of the will" plays an important part in our system of conflict of laws. In a continental court, the paramount question will always be : which was the law that the settlor intended to govern the trust ? It is then wise to include in all trust deeds liable to have effect in civil law countries an express clause stating which law should govern the trust.

That theory of autonomy of the will raises a very interesting problem: Is it necessary that the settlor refer to the law of one definite State: law of England, of New York, of Pennsylvania, of Australia, etc.? I do not believe so.

We must outgrow the Austinian jurisprudence which is hypnotized by the idea that law is the expression of the will of a Sovereign. Even if one believes in that jurisprudence when it is applied to the common law, one must admit that it cannot fit in the continental conception of "autonomy of the will." If a private individual can, according to our legal system, select the law which he wants to be applied to him, we must admit that the Sovereign of the country of which the law is so selected has nothing to say and that the different laws appear as articles in the show window of a store. One selects a law for his contract as a necktie for his business suit. If the idea of law is not, for us, necessarily connected with that of Sovereign, a valid trust deed can be made on the Continent without stating that such deed should be governed by the law of this or that State. If such is the case, it will be the general principles of common law and equity as agreed upon by the courts of England and America which will be the only law selected to govern the trust deed. Such was the case for the Dawes Plan which declared "trustee" the Reparation Agent; such is now the case with the Young Plan which has made the Bank of International Settlements "trustee"; neither of those two documents mentions which law of trust is applicable.

Then two laws will have to pass in the same time on the validity of an *inter vivos* trust: the law of the *situs* of the *res* and the law intended by the settlor to govern the trust.

In practice, efforts are made to have those two laws coincide. For instance, if a Frenchman wants to create a trust with an American "Trust Company" as trustees, the funds will nearly always be transferred to New York prior to the execution of the trust deed.

It is, of course, impossible to determine all the obstacles which may be raised by French courts to the creation of certain *inter vivos* trusts. It is evident that some trusts will be illegal under the civil law, just as some trusts are illegal under the common law. Let us state simply that the landmarks of public policy are not exactly at the same place, but in the same region, as, fundamentally, we have the same civilization and the same social interests to protect.

There is, however, one instance in which the validity of an *inter vivos* trust will not be tested according to the foregoing principles: that is when the question is to know whether a trust can be revocable; under French law, for example, revocable gifts are forbidden. The only important exception is when the donor is the husband or the wife of the donee. The prohibition of revocable gifts is taken to be a protection for the family of the donor and is treated, in conflict of laws, as a part of the decedent estate law. It has been held, accordingly—and I submit wrongly—that the validity of a revocable gift *inter vivos* must be determined by the law applicable to the estate of the donor.

As to testamentary trusts, their validity is determined as follows: for real estate, the law of the *situs* governs; for personal property the situation is more complex as civil law countries are now in a state of evolution. The theory of domicile is gaining the ground which the theory of nationality is losing. The law of each continental State should be studied separately. Let us take only as an illustration the French situation. Under French rules of conflict of laws, French law is applied: (1) when the settlor is French and dies domiciled in France, (2) when foreign law sends back to French law according to the *Renvoi* theory, (3) probably when a settlor is a foreigner domiciled in France at the time of his death. I say "probably," that point being still unsettled because of the absence of any decided cases since some recent changes in our legislation.

The main obstacle which testamentary trusts may encounter under civil law is the "reserve" or "forced heirs" theory, according to which certain heirs at law cannot be deprived from the full and unincumbered ownership of a certain portion of the estate. If, for instance, I leave two sons, and make a testamentary trust of the whole of my estate, my trust will be reduced by two-thirds, since I cannot by testament deprive my two children from the full ownership of those two-thirds. As one readily understands from that example, the reserve theory does not necessarily and always pertain to the validity of the will: it may often simply result in a reduction of the trust *res* to the portion of which the testator can freely dispose.

That theory is not only important for testamentary trusts but also for *inter vivos* trusts, for this reason: in order to determine what is the basis for the calculation of the share of each forced heir one must add to the assets actually owned by the deceased at the time of his death the amount of the gifts *inter vivos* made by him; if the assets actually left by the deceased are not sufficient to satisfy the claims of the forced heirs, the *inter vivos* gifts are reduced in starting from the most recent ones. Let us illustrate by an example: I have made three *inter vivos* trusts constituting gifts to third parties. One of £1,000 in 1910, one of £1,200 in 1920 and one of £800 in 1930. I leave at my death £3,000 and two children. Their portion of the "reserve" is two-thirds of 6,000 (1,000 + 1,200 + 800 + 3,000) = 4,000. The last trust will be cancelled, the trust made in 1920 will be reduced from £1,200 to £1,000. The first one alone will be left intact.

Now suppose that when I made the second trust in 1920 I was domiciled in England, should that trust be reduced? The question is delicate. I submit, however, that if the trust was not reducible or voidable at the time it was made, a foreign law cannot, later, declare it reducible or void, because that would be against the theory of vested rights. Therefore the trust of 1920 should be left entirely intangible and the trust of 1910 should be subject to reduction if made under the civil law.

If a trust is against the theory of forced heirs in a case where such theory should be respected, what is the situation of the trustee?

As the forced heirs are the only ones who can enforce their rights, the trustee is not liable if, in the absence of any claim by them, he performs his duties under the trust. However, if the heirs file their claim, the trustee must, as soon as he knows that such a claim is made, stop all payments under the trust and await a final judgment upon which he will act. If he does not do so, he becomes personally liable to the heirs. If he has already paid the funds before knowledge of any claim, he cannot be held liable.

2. *Capacity in the Conflict of Laws.*—The problem of capacity in the conflict of laws will also create some difficulties. As a principle, questions of capacity will be determined by the law of the nationality.

The capacity required from the settlor will be that which is necessary to transfer property, since a trust must always be considered as a segregation of assets from the assets of the settlor. For instance, a valid trust of securities or of real estate cannot be created under French law by a French minor child, if the creation of the trust is not authorized by what we call the "family council" and approved by the court.

As to the trustee, there is, strictly speaking, no problem of capacity. If a trust is an appropriated patrimonium, if no one can be considered as the owner of the *res*, the rights forming the subject-matter of the trust have an existence simply because they have a status objectively determined. Those rights do not need the support of an individual or of a legal entity : what they need is simply a human will that can put them into action. The function of a trustee is not to be vested with rights but to exercise them. He is the hand inside Punch and Judy which gives them motion. Civil courts should only require one thing from the trustee : a will that can be taken into consideration by law.

If, however, the trustee is neither an individual nor a legal entity, if it is, for instance, an unincorporated body, it will have to have assets appropriated to its benefit, because the trustee incurs liabilities and those liabilities must either be borne by an individual or a legal entity, or grafted as a charge on a patrimonium.

When the cestui is a person or a legal entity, the problem of his capacity must be raised. Hence, under French law, a French minor cannot accept a trust without the authorization of the family council. In such a case, the acceptance will necessarily be express. The law of the nationality of the cestui will also determine to whom the funds must be paid by the trustee, who can give a valid receipt, etc.

3. *Distinction between Capacity and Power.*—The problem of capacity must be carefully distinguished from that of power. The line between the two is difficult to draw. It should, however, be drawn because the rules of conflict of laws applicable to them are very widely different. Let us illustrate the distinction in giving only one example of power which we have often to consider in the practice of international trusts.

A French husband, married under the community property régime, wants to create a trust with community property. Has he the power to make a valid trust ? The law which can answer that question is that which has created the power. If it appears in fact that the parties intended to adopt the French community régime at the time of their marriage, the husband cannot make a valid trust of community property unless the trust (*a*) is made for a *bona fide* valuable consideration ; (*b*) or ends at the dissolution of the community ; (*c*) or is made for the " establishment " of a child ; (*d*) or is made by the husband and the wife.

**Conclusion.**—Such are the main big difficulties of the problem of trusts under the civil law. Most of them can be overcome, so that international trusts, if they are carefully handled, may have a much wider scope on the Continent than is usually thought.

The trust gives me the impression of a man who was born and educated on a remote farm in the provinces, was thoroughly provincial but little by little enlarged his personality and becomes a national and an international figure, but still continues to wear very old-fashioned peasant clothes. I submit that he should no more be treated as a peasant, but as an up-to-date international business man.

Trusts are another illustration of the fact that our differences are more apparent than real.

If an English and a French jurist speak of trusts, there is a great probability that they will not understand each other. They will feel extremely remote from each other. If, however, they are interested enough to go beyond the mere appearance to see the reality itself, they discover with amazement and with delight that they are very close.

# THE DEVELOPMENT OF AMERICAN ADMINISTRATIVE LAW.

[*Contributed by* PROFESSOR MARSHALL E. DIMOCK, PH.D., *of the University of California, Los Angeles.*]

" THE hegemony of the executive is at hand. As the eighteenth century and the fore part of the nineteenth century relied upon the legislature and the last half of the nineteenth century relied upon the courts, the twentieth century is no less clearly relying upon administration."

These words were addressed to the American Bar Association by Dean Pound more than ten years ago. Every year since then it has appeared more clearly that administration is rapidly becoming dominant in the United States, just as it has gained ground in England during recent years. The distinction between the " Continental " system, involving the primacy of administration, and the " Anglo-American," entailing legislative supremacy, has become largely obliterated.

In America, the quickened interest in public administration has brought about a new interest in administrative law. The torch which was lighted about the beginning of the century by Frank J. Goodnow, the " father of American administration," and which was permitted to die down due to the attempt to " rid political science from the bondage of the lawyer "—this beacon light is now looked to by an increasing number for a more realistic, a more complete development of public administration. Public administration and administrative law are as inseparable as cause and effect.

An insight into the degree and direction of American administrative law development may be obtained by analysing some of the factors which have induced the growth. The chief causes which have influenced the development of American administrative law are : (1) The rapid increase of industrial and social legislation. (2) A more liberal construction of the separation of powers principle. (3) The growth of executive power at the expense of the legislative. (4) A more sympathetic attitude toward administrative law on the part of certain leaders of the legal profession. (5) A clearer recognition of the full scope of administrative law. (6) The administrative law research and teaching which is taking place in leading American Universities. Each of these points should receive some attention.[1]

**Social Legislation and Administrative Law.**—The response of public authority to the need for industrial and social control underlies most of the important governmental developments of recent years. For example, due process of law and judicial review of legislation have assumed new significance with the passage of laws regulating hours of work and fair value, but the phenomenal expansion of American business undertakings—the "Second Industrial Revolution"—which has occurred since the latter part of the nineteenth century has left its clearest imprint upon the administrative machinery of government: new forms and novel methods have been created as necessity dictated.

The United States is a government of commissions. Beginning with the State Railway commissions shortly after the Civil War, the country has now placed practically every business and profession under the control of some municipal, state or federal commission. The National Government has an Interstate Commerce Commission, a Federal Trade Commission, a Federal Reserve Board, a Tariff Commission, a Shipping Board, a Railway Conciliation Board, a Federal Power Commission, a Federal Radio Commission and a Federal Farm Board. In the States one usually finds Public Utility Commissions, Banking Commissions, dental, medical and legal examiners, Industrial Accident Commissions, and various other boards and tribunals which exercise control over industry and commerce. The larger cities have their Boards of Public Works, licensing and inspection boards, and a few maintain public utility commissions.

These are simply some of the more notable commissions. In addition there is a host of individual commissioners dealing with patents, claims, immigration, internal revenue, prohibition, and a variety of other economic and social problems. Many of these executive agents are armed with far-reaching judicial and ordinance-making powers. Practically all of the commissions are independent or detached tribunals. So, taken in the large, this development can be interpreted in only one way: in a relatively brief period of time, the United States has created one of the largest, most ramified, most powerful bureaucracies in the world. Moreover, this bureaucracy does not possess a highly developed professional tradition, the self-discipline of a corporate *esprit de corps*, which in older countries constitutes the most effective guarantee of proficiency and of devotion to the public welfare. Hence the need for administration through legal restraint, imposed either by courts or by higher administrative bodies, is all the more imperative.

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[1] Consideration of certain allied problems will be found in the present writer's article, "Some Aspects of American Administrative Law," *Public Administration*, IX, No. 4 (October 1931), pp. 417–22.

The need for remedies arising out of disputed administrative action has not been met entirely by the ordinary civil court system, despite the tradition of the "rule of law." A group of tribunals and courts have been established which may be classed properly as administrative courts. Not long ago the Chief Justice of the California Supreme Court stated that administrative adjudication has progressively caused a narrowing of the common law foundation, and that the end is by no means in sight. The Supreme Court of the United States has recognized the existence of administrative courts in the case of the United States Court of Claims, the United States Court of Customs and Patent Appeals, and the Court of Private Land Claims. In the important case of *Ex parte Bakelite*,[1] the Supreme Court clearly indicated that the aforesaid courts are "legislative" or administrative courts, as distinguished from "constitutional" courts. This ruling gives judicial support to a practical differentiation which has been growing up since the earliest days of the country and which was encouraged most by the establishment of the Court of Claims in 1855. It should be noted that these courts are agencies which exist for the purpose of reviewing administrative action. The only matters which the *Bakelite* decision permits to be cut away from the constitutional courts are those which Congress could, but does not ordinarily, commit to the final determination of the executive officers.[2]

It is still true in America, as in England, that the principal source of so-called "Administrative Law" is the "interstices of the common law." In large part this is due to the difficulty of learning and digesting the "law in action" of the administrators themselves. It is undoubtedly true that more administrative law is made and executed by administrators than by judges. Statutes are not self-enforcing. Only a relatively small number of administrative decisions are actually adjudicated. The exercise of discretion, the promulgation and enforcement of supplementary legislation,[1] the daily determination of manifold rights and duties of the citizen, the creation of "standards" relative to technological problems—these are all the normal, inevitable characteristics of a growing number of administrative powers.

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[1] 279 U.S. 438 (1929).

[2] This whole problem has received penetrating analysis from W. G. Katz, "Federal Legislative Courts," *Harvard Law Review*, vol. 43 (April 1930), pp. 894–924.

Such a realistic view of American administrative law and of the instrumentalities through which it is developed is taken only by the Holmes', Brandeis', and Cordozos'. As a matter of fact, the existence of a formative hierarchy of administrative courts goes considerably beyond the suggestions in the *Bakelite* case. One finds important judicial powers being exercised, and a varying degree of finality being permitted in cases of immigration; where there is the disposition of money paid by a foreign government to the United States for the account of its citizens pursuant to the award of an international claims commission; and in the fields of revenue, customs, naturalization and industrial accidents. There is a growing tendency to label as administrative courts the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission and the State Public Utility and Industrial Accident Commissions. F. J. Port very properly points out in his book entitled *Administrative Law* that, "Since 1911, forty-seven states and territories have passed statutes governing workmen's compensation, and of these as many as thirty-seven have entrusted decisions as to liability to administrative boards or commissions." Boards of Tax Appeals, federal, state and municipal, may well be considered administrative courts.

The most noticeable tendency toward administrative court hierachy is found in the federal government. Congress is bringing this about by giving the Supreme Court and the Court of Appeals of the District of Columbia the power to review, in important fields, the decisions of administrative officials, administrative tribunals and federal legislative courts.[2] These courts are likewise legislative courts, even though the justices hold office during good behaviour: and tenure during good behaviour is held to be one of the two principal grounds of discrimination between constitutional and legislative courts. If Congress continues to withdraw the appeal of technical administrative cases from the district courts and vests them in the courts of the District of Columbia, we shall have the substance if not the formal recognition of a hierarchical administrative court system. Considerations of special competence, increased remedies, the lessened expense and the greater speed and informality, which are usually associated with administrative courts, should impel Congress to take such action. The possibility of there being established a parallel administrative court system, arising out of the important legal growth and the powerful new administrative agencies which have come into being as a result of the economic and social problems confronting the country, depends in addition upon the several factors which are motivating the evolution of American administrative law.

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[1] Probably the best thing in Anglo-American literature relative to this subject is the recent report of the Scott Committee on "Minister's Powers," Cmd. 4060, April 1932, H.M. Stationery Office.

[2] *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (1927); *United States* v. *Duell*, 172 U.S. 576 (1899).

**Liberal Construction of the Separation of Powers Doctrine.**—The strict or the liberal interpretation of the separation of powers principle is one of the main problems of administrative law expansion. Judges who are zealously alert to check any evidence of the exercise of power which possesses judicial characteristics can usually kill effectively any desire of the legislature to entrust to the administration the right to determine the substantive rights and duties of the individual, which in this complex age is recognized as a necessary element of sound administrative practice. This is particularly important in the United States, where the courts have the power to review legislative acts. It stands to reason that before a development like the one described above could occur, where commissions perform important judicial functions, a rationalizing of the strict separation of powers theory must have taken place.

That such a rationalizing process has occurred in recent years may be seen at once by analysis of such important cases as *McGrain* v. *Daugherty*,[1] *Field* v. *Clark*,[2] and *United States* v. *Louisville and Nashville R.R. Co.*[3] It should be noted as a matter of practical importance, however, that in all of these cases Congress had passed laws making it clear that a liberal construction of powers was necessitated in order to bring about greater efficiency. The latter cases are particularly interesting because they deal with the authority of the most powerful administrative tribunal in the country, the Interstate Commerce Commission. In earlier cases[4] the Supreme Court had held that Congress had not conferred upon the Commission the power to do what is in its nature a legislative act, viz. to determine what rates should be charged in the future. After the passage of the Hepburn Act in 1906, the rationalizing process set in, with the result that by the time of the *Louisville and Nashville Railway* cases the power to fix minimum and maximum rates was upheld and the commission was sustained in its right to examine not only the accounts of the carrier, but all its correspondence as well. The rationalization took the convenient form of "quasi-legislative" and "quasi-judicial" powers. Another important step had been added in the moulding of American administrative law.

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[1] 273 U.S. 135 (1926).

[2] 143 U.S. 649 (1892).

[3] 227 U.S. 88 (1913); 235 U.S. 314 (1914); and 236 U.S. 318 (1914).

[4] *C.N.O. & T.P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 184 (1895) and *Interstate Commerce Commission* v. *C.N.O. & T.P. Ry. Co.*, 167 U.S. 479 (1896).

> The subject of workmen's compensation [writes F. J. Port] provides the best illustration of the radical change which the constitution of the United States has recently undergone in respect of the interpretation of the doctrine of the separation of powers. When an admittedly administrative body hears evidence and thereupon determines the liability of an employer to an injured workman, even the most subtle arguments can scarcely be convincing to prove that judicial powers are not being exercised in contravention of that doctrine. Add to this that in some states such liability must still be determined by the courts, and even the most able apologist must admit that a fundamental change has taken place in those states where the newer system is in operation.[1]

Speaking before the American Bar Association in 1916, Mr. Elihu Root said, "Before these (administrative) agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."

**The Growth of Executive Power.**—There is a third factor which is stimulating the development of American administrative law: the growth of executive power at the expense of legislative power. In the last ten years about one-third of the American States have reorganized their administrative systems. The central feature of reorganization is the integration of departments, with the governor holding, as he never has before, the reins of power. Several States have established governors' councils, after the model of the federal cabinet. The objective is to make the governor actually responsible for the administrative services. Hierarchy, professionalism, responsibility, are not these the usual accompaniments of a developed system of administrative law ?

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[1] F. J. Port, *Administrative Law*, p. 282. A classic discussion of this problem is found in *Western Metal Supply Co.* v. *Pillsbury*, 156 Pac. 491 (1927). The opinion of Mr. Justice Rosenberry (now Chief Justice) in the case of *ex rel. Wisconsin Inspection Bureau* v. *Whitman*, 196 Wis. 472 (1928) is also a masterpiece.

The most impressive increase of executive power is in the national government. The greatest victory for the presidency in administrative history was the decision in the case of *Myers* v. *United States*,[1] which held that the President may remove officers without asking the consent of the Senate, although such approval is necessary in making the appointment. There is no longer any question that the President is the administrative head of the government. Moreover, the ordinance-making powers of the executive continue to gain momentum.[2] An excellent recent example of the liberality that is now permitted the executive department in exercising power which appears to be legislative is found in the case of *Hampton Co.* v. *United States*,[3] where the powers of the President under the flexible tariff law were upheld.

In short, the growth of administrative power by means of authority transferred from the legislature reveals a pattern strikingly like conditions in England described by writers such as Ramsay Muir, Lord Hewart and Professor Allen. As a result, the identical question has arisen, namely, can effective popular safeguards be developed as rapidly as the delegation of power appears to be taking place ? The answer is still in doubt.

The common law remedies are inadequate, slow and too costly. The American President has never been sued successfully. Actions brought against the governors of States have rarely achieved success. The courts will not assume jurisdiction over so-called political questions. The Supreme Court has upheld the right to mandamus the heads of departments,[4] and federal and state legislation has shown a tendency to make officers more liable to suit in their individual capacities. Furthermore, there has been a slight increase of governmental liability for torts.[5] But that the legal liability and legal remedies are not comparable to the rate of increase of administrative power, everyone knows who has looked into the matter.[6]

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[1] 272 U.S. 52 (1926).

[2] On this point see James Hart, *The Ordinance-making Powers of the President* (1926), and J. P. Comer, *Legislative Functions of National Administrative Authorities* (1927).

[3] 276 U.S. 394 (1928).

[4] *Kendall* v. *United States*, 12 Peters 524 (1838).

[5] The writer has dealt more adequately with the question of liability in an article entitled " American Administrative Law in 1931," *American Political Science Review*, vol. xxvi, no. 5 (October 1932), pp. 894–910.

[6] On this point the report of the " Crown Proceedings Committee " is instructive and analogous. Cmd. 2842, April 1927 (H.M. Stationery Office).

Administrative courts, composed of members who would possess first-hand knowledge of modern-day administration, administering laws which acknowledged public liability for all torts, would, it is believed, go a long way toward the improvement of conditions.

**More Friendly Attitude of Legal Profession.**—One of the most encouraging omens in the recent development of American administrative law is an attitude of greater understanding toward what was long considered foreign and competitive, and the actual championing of administrative law by several outstanding civil law leaders. A. V. Dicey's misconception and prejudice were transplanted to American soil. But with the opportunity which hundreds of common law trained attorneys have had to practise before administrative courts and tribunals, their appreciation has grown. Many others act as referees and as judges. Among the better class of lawyers and jurists there is general agreement that civil and criminal procedures are too technical, too slow, and too expensive. Administrative procedure usually affords the opposite ; the contrast has made many converts to administrative law.

One of the best friends of American administrative law is Dean Roscoe Pound of Harvard Law School. He has been responsible for pointing out that although in nineteenth-century American thinking law and administration were regarded as rival rather than as complementary agencies, in the twentieth century the development of rules, principles and standards of administrative law is imperative.[1]

In his presidential address to the New York Bar Association in 1923, William D. Guthrie discussed the development of American administrative law, praised the French system of administrative courts, and concluded :

> It has been found in France, as it will be ultimately found with us, that private rights can be afforded full protection by independent judicial tribunals without unduly interfering with or hampering administrative efficiency . . .

One more illustration may be made to suffice. In an excellent article entitled *Administrative Law and the Constitution*,[2] the Acting Chief Justice of the Supreme Court of Wisconsin said :

> That the development of administrative law must stop short of combining in one person or group legislative, executive and judicial power

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[1] See particularly "The Administrative Application of Legal Standards," *Reports of American Bar Association*, vol. 44, 1919.

[2] *American Political Science Review*, vol. 23 (February 1929), pp. 32–46.

which may be exercised arbitrarily—seems to be axiomatic. It seems probable that the matter will be worked out ultimately by way of constitutional amendment, permitting the creation of a court comparable to the French Council of State, in order that highly technical and complex questions involved in administrative law may be reviewed by a competent tribunal.

So long as the legal profession was almost unanimously hostile, American administrative law developed by sufferance, certainly not by choice. With an attitude so changed as that represented in the views of leading figures of the American Bar, administrative law faces a period of unprecedented growth.

**Enlarged Ambit of Administrative Law.**—American administrative law has not crystallized ; it is not even clear that the confines of administrative law, as distinguished from constitutional law for example, have been clearly established. One of the unquestioned difficulties of the past has been the failure to consider the entire ambit of administrative law. The time has come when some form of general agreement should be reached concerning the extent and the limits of the administrative law field. Of course it is only natural that the several commentators on any substantial body of law should emphasize some aspects which are their individual specialities, to the comparative neglect of others. Thus Goodnow undoubtedly stresses organization and officers ; Frankfurter pays particular attention to public utilities ; while Freund almost completely excludes organization and officers. So long as this incompleteness exists among the principal authorities on administrative law, it stands to reason that critics might scoff at its unimpressiveness as a science, and state that it has no legitimate claim to separate existence. As a matter of fact, Dudley O. McGovney in his *Cases on Constitutional Law* attempts to absorb the principal cases on administrative law into constitutional law, and has indicated that in his opinion administrative law has no claim to independent consideration as a law-school course. Fortunately there are not many who would attempt to do this.

But the warning is opportune. Administrative law should be clearly defined, at the same time recognizing the desirability of close syntheses with constitutional law, public administration and related fields. A definition which will approximate the current idea concerning the bounds of administrative law may be suggested. American administrative law is that body of public law which relates to the organization of the administration ; its legal relation to other departments and powers of the government ; the rights and duties of holding office ; and the nature and extent of the powers, regulations and methods by which the objectives of government are carried out administratively.[1] The second part of the subject deals with the liability of the officer and of the government for illegal acts which injure the citizen ; and the remedies, judicial and administrative, which the government provides in order to assure relief.[2]

It is quite possible that when its metes and bounds have been clearly established, American administrative law may be found to be more comprehensive than the *Droit Administratif.*

One reason is that so much public utility and industrial law has been utilized by administrative law.[3] Furthermore, because of the central position played by the separation of powers principle, the problems of administrative discretion [4] and administrative finality [5] are of immense importance. Again, American administrative law is closely identified with public administration, and on that account is not so rigid and so technical as the *Droit Administratif* evidences a tendency to become. Finally, the all-pervasive " due process of law " clauses apply to administrative acts as well as to legislation.[6] Incidentally, these provisions of the Fifth and Fourteenth Amendments are the principal constitutional stumbling-blocks in the path of an independent administrative court system.

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[1] Port's *Law in Action.* It is in this aspect of the subject, in the realm of administrative powers, that the most realistic (but most difficult) work needs to be accomplished.

[2] Compare this statement with that of Professor H. Berthélemy, " The *Conseil d'Etat* in France," *Journ. Comp. Leg.*, vol. xii, pt. i, pp. 28, 29.

[3] As prominent examples of this, reference may be made to *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920) ; *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 568 (1923) ; *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447 (1894) ; and *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920).

[4] Outstanding examples are *People* v. *Illinois State Board of Dental Examiners*, 110 Ill. 180 (1884) ; *United States Fidelity and Guaranty Co.* v. *Lineham*, 73 N.H. 41, 58 Atl. 956 (1904) ; and *United States* v. *Grimaud*, 220 U.S. 506 (1911). The writer has examined the analyses of discretion in France by M. Roger Bonnard, " Le pouvoir discrétionnaire des autorités administratives et la recours pour excès de pouvoir," *Revue du Droit Public* (1923), pp. 363 ff., and M. Waline, " Le pouvoir discrétionnaire de l'administration et sa limitation par le contrôle juridictionnel," *Revue du Droit Public* (1930), pp. 197 ff.

[5] For representative cases one is referred to *Spiller* v. *A.T. & S.F. Ry.*, 253 U.S. 117 (1920) ; *United States* v. *Tod*, 263 U.S. 149 (1923) ; *Ma-King Products Co.* v. *Blair*, 271 U.S. 479 (1926) ; and *Berkey & Gay* v. *Federal Trade Commission*, 42 F. (2d) 427 (1930).

[6] Failure to provide proper notice and hearing are the usual objections. *Yick Wo.* v. *Hopkins*, 118 U.S. 356 (1885) ; *Murray* v. *Hoboken L. & I. Co.*, 18 Howard 272 (1855) ; *Hagar* v. *Reclamation District*, 111 U.S. 701 (1884) ; and *People* v. *Board of Health of City of Yonkers*, 140 N.Y. 1, 35 N.E. 320 (1893).

**The Progress of Research.**—Administrative law is a large field, and it can be developed best by a clear recognition of the fact. During the time in which the body of administrative law and the framework of an administrative court system are evidencing so much promising growth, it would be unfortunate to weaken the edifice by failure to take in everything that belongs to it.

This responsibility rests principally upon that body of scholars in American universities who have been doing so much to bring administrative law into its own. President Frank J. Goodnow paved the way for all that followed by his *Principles of the Administrative Law of the United States* (New York, 1893), still the only comprehensive book dealing with principles. Goodnow, Ernst Freund of Chicago Law School and Felix Frankfurter of Harvard Law School have written the only case books in the field. Professor Frankfurter has also contributed a volume dealing with *Cases under the Interstate Commerce Commission Act* (Cambridge, 1915).

In the last few years two books have made outstanding contributions to the literature of American administrative law. *Administrative Justice and the Supremacy of Law* (Cambridge, 1927), by Professor John Dickinson of the University of Pennsylvania Law School, has probably done more than any book to stimulate interest in administrative law, in England as well as in the United States. A year later Professor Freund's long-awaited magnum opus, *Administrative Powers over Persons and Property* (Chicago, 1928), made its appearance.

In 1923 Freund and others contributed a valuable symposium entitled *The Growth of American Administrative Law* (St. Louis, 1923). A great deal of light was thrown upon administrative law by more specialized studies prepared by Gerald C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (New Haven, 1925), and E. W. Patterson, *The Insurance Commissioner in the United States* (Cambridge, 1927). Following the *Myers* decision, monographs were prepared by Professors E. S. Corwin, *The President's Removal Power* (New York, 1927), and James Hart, *Tenure of Office under the Constitution* (Baltimore, 1930).

Recently the Commonwealth Fund of New York has released studies which deal exhaustively with the Interstate Commerce Commission (Sharfman), Legislative Regulation (Freund) and the Administrative Control of Aliens. These significant contributions, added to the authorities quoted in the preceding pages, indicate clearly that the star of administrative law is rapidly rising.

Just as encouraging are the studies which are in process of completion. According to information contained in *Current Research in the Law* (Baltimore, 1929, 1930), studies will soon be completed relative to the limits of discretion ; the judicial powers of tax appeals authorities ; the Corporation Commissioner of Oklahoma ; administrative rule-making powers in Massachusetts ; and the powers and procedure of industrial accident commissions in the principal States.

As one takes stock of the development of administrative law in the United States, it should be recognized clearly that the growth of symmetry and completeness in the body of administrative law has been contributed by a small group of devoted research men ; success in the future depends largely upon the same resource.

In concluding this survey, the writer cannot restrain a desire to express certain ideas with reference to future objectives in the evolution of American administrative law.[1] First, it is suggested that administrative law should be, and already indicates a tendency to become, more closely associated with public law, public administration and departments of political science. The last vestiges of common law domination should be broken. Second, and this grows partly out of the first point, it is necessary to add to the common law remedies represented in mandamus, certiorari, habeas corpus, injunction and damages. In this day and age, legislation must permit wider freedom of suit against officers and against the service or the community. Legislatures should provide suitable remedies ; the relief afforded by the courts does not suffice. Again, there is a need for studies which will emphasize powers rather than limitations and liabilities ; administrative law-making instead of judge-made law. Finally, serious attention should be given to the expediency of creating a logical hierarchy of administrative courts. The American Bill of Rights is said to be " vanishing." The late Chief Justice Taft said our civil and criminal procedures are " disgraceful." Power has outstripped responsibility. Administrative law can supply the remedy ; administrative courts should set a new standard of justice.

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[1] The writer has attempted to delineate some of the tendencies of American administrative law in " Le Droit Administratif Américain, 1931," *Annuaire de l'Institut International de Droit Public* (1932), pp. 542–63.

# THE EQUALITY OF STATUS OF THE DOMINIONS AND THE SOVEREIGNTY OF THE BRITISH PARLIAMENT.

[*Contributed by* DR. H. VER LOREN VAN THEMAAT, *University of Stellenbosch, South Africa.*]

"THE sovereign authority of the United Kingdom in respect of the Dominions stands in law unquestioned,"[1] wrote Professor Keith in 1929. "The Act itself (the Statute of Westminster) is a singular assertion of the sovereign authority, which still adheres to the Imperial Parliament."[2]

In the opinion of Professor Keith the old doctrine of the Sovereignty of the British Parliament stands at the present date still unimpaired.

On the other hand there are authors who take the opposite view that the equality of status has made an end to the sovereignty of the British Parliament. According to their view the Dominions are independent of any external authority. Professor Lowell of Harvard University writes: "Hence the latter (the Dominions) would appear to have become legally and politically, in both domestic and foreign matters, independent states";[3] and at another place: "The independence of the Dominions, the absence of authority over them by Great Britain are real."[4] Dr. T. Baty expresses the same opinion: "Evidently the great Colonies have become independent sovereignties,"[5] and at another place: "The Imperial Parliament seems to have ceased in law, as in fact, to be supreme throughout the dominions of the King."[6]

A great divergence of views still exists among the Constitutional authors concerning the legal position of the British Parliament in the "British Empire" or, to use the modern term, "The British Commonwealth of Nations." As far as I am aware, judicial interpretation is entirely lacking.

When one speaks of the sovereignty of the British Parliament, it is not at all superfluous to inquire what that term really means. Dicey says that "the nature of Parliamentary sovereignty is a legal fact, fully recognized by the law of England,"[7] but he fails to give the exact rule defining that sovereignty. Often the "sovereignty of the British Parliament" is understood as the "legal omnipotence of the British

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[1] *Dominion Autonomy in Practice*, p. 33.

[2] *Journ. Comp. Leg.*, vol. xiv, pt. i, p. 102.

[3] *The British Commonwealth of Nations* (World's Peace Foundation Pamphlets, vol. x, n. 6), p. 583.

[4] *Ibid.*, p. 587.

[5] *Journ. Comp. Leg.*, vol. xii, pt. 4, p. 163.

[6] *Ibid.*, p. 165.

[7] Dicey, *Law of the Constitution*, 1920, p. 37.

Parliament." If interpreted in this way, the consequences of this doctrine are startling. If the legal omnipotence of the British Parliament is accepted, the Treaty of Versailles of 1783, whereby the United States is declared independent, has not affected in any way the legal right of the British Parliament. This Parliament is still competent to make laws for the United States in the same way as it was competent according to the "Declaratory Act" of 1766 to make laws for the American colonies "in all cases whatsoever." The British Parliament must according to this doctrine have an unlimited legal power to make laws for the Germans in Berlin, the French in Paris, the Chinese in Peking. It is not bound by any rule of international law that limits the jurisdiction of sovereign States.

The British Government certainly does not act in accordance with this doctrine. She has accepted the well-known Optional Compulsory Clause of the Statute of the Permanent Court of International Justice, and has subjected Great Britain to its jurisdiction. That court can declare an Act of the British Parliament violating obligations stipulated in a treaty or in conflict with rules of international law *ultra vires* according to international law.

The term "sovereignty of the British Parliament" can, however, mean something quite different. Sir Matthew Hale calls the British Parliament "the highest and greatest court, over which none other can have jurisdiction in the Kingdom."[1] The High Court is the Supreme Court, no other court has the right to draw the legality of the acts of this highest court in doubt. Whether these acts are of a judicial, executive or legislative nature does not affect the attitude of the courts to them. The English courts are bound to apply every Act of Parliament because they are subordinate courts. This view is quite in accordance with the original position of the British Parliament. The British Parliament was the highest "Curia," as it was the highest "Concilium" in the realm.

The English Constitution has never known that separation of legislative, executive and judicial powers which Montesquieu thought its dominant feature. Parliament has never ceased to combine these three powers. The courts and the Executive Government of Great Britain have always been subordinate to this highest power in all respects.

In the United States the position is different; there the powers are independent of each other: the Supreme Court is not subordinate to any other power in expounding and applying the law and has the full right to declare a statute *ultra vires*.

This view is corroborated by the Scottish Case of *Mortensen* v. *Peters* (1906) 8 F. (Just.). At p. 100 of the judgment Lord Dunedin says:

> In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknow-

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[1] Dicey, *Law of the Constitution*, 1920, p. 40.

ledged principles of International Law. For us an Act of Parliament duly passed by Lords and Commons, and assented to by the King, is supreme, and we are bound to give effect to its terms.

The courts have no authority to disregard an Act of Parliament.

This conception of the legal jurisdiction of the British Parliament differs fundamentally from the current theory of parliamentary sovereignty. It does not mean that Parliament is bound by no rule whatever, that Parliament is a real *princeps legibus solutus* in the sense of Bodin's doctrine of sovereignty as accepted by later English authors, but only that the courts are not competent to adjudicate about the validity of an Act of Parliament and that their function is limited to interpreting and to applying it.

A similar position existed in Germany in the eighteenth century.[1] The princes of the several German States were not *legibus soluti*, they were bound by real legal rules, the rules of the law of nature, but the courts subject to these princes were not competent to disregard any statute made by them. They had to apply it without any regard to its validity. The prince stood between the *jus naturale* and the *jus positivum*; he was bound only by the first and not by the laws he made himself. The courts, however, could not apply the *jus naturale* against a statute. The legal rules which defined and limited the power of the prince were *leges imperfectæ* which could not be enforced by the courts.

According to this view, the legal position in England at the present day is much the same. If there are rules defining and restricting the authority of the British Parliament, they cannot be enforced by the courts, they are *leges imperfectæ*.

The rule *pacta sunt servanda*, one of the oldest maxims of the so-called Law of Nature, is such a *lex imperfecta*.

The validity of the Irish Treaty, 1921, is based on this rule. Professor Keith calls it an anomaly quite in accordance with his theory of the sovereignty of the British Parliament. The Irish Treaty has caused the utmost confusion. It is not recognized as a real treaty by British authors and still they maintain that Ireland is bound by it, while Great Britain cannot be bound by it, because the English Parliament cannot bind itself.

Seen in the light of the theory that the English Parliament is bound by the law, that there are rules, defining and limiting its authority, even though they are *leges imperfectæ*, unenforceable by the courts, there is from a legal point of view nothing at all wrong with the Treaty. There is no anomaly; Great Britain is bound by the Treaty as well as Ireland.

"No taxation without representation" is another rule of similar nature. Disregard of this rule and the strict adherence to the doctrine of the sovereignty of the British Parliament have cost Great Britain her American colonies. The English themselves have recognized this rule in their maxim "taxes are the free gift of the people," implying that

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[1] See Gierke, *Johannes Althusius*, ch. vi, "Die Idee der Rechtsstaat."

Parliament has no right whatever over the purses of people not represented by it. Pitt acknowledged the right of the Americans to object against the taxing power of the British Parliament; "Taxation is theirs, the regulation of commerce ours," he said. The Taxation of Colonies Act of 1778 implies this rule, limiting the parliamentary power to a certain extent.

During the Middle Ages the English King was the only sovereign, but he was not a *princeps legibus solutus*. As Braeton states it, the King was *non sub homine, sed sub Deo et Lege*. He was a "King by the law of the Land." According to the view now expounded, Parliament, like the King, is not a *princeps legibus solutus*. Parliament as well as the King is an authority deriving its power from the law. Parliament is "a Parliament by the law of the Land." Parliament has, as well as the King, a superior, viz. the Law. Just as in the United States, there is in England "Sovereignty of the Law."

Once conceded that Parliament derives its authority from the law and that the law puts limits to that authority, the declaration of the status of Great Britain and the Dominions presents itself in quite a different light.

The courts are incompetent to declare the law in so far as it limits the authority of the British Parliament, but the British Parliament itself can declare the law by a Declaratory Act. There is also no reason why a Conference of British and Dominion statesmen, though lacking the legal authority of the British Parliament, cannot make a declaration about the law. The Declaration of 1926 is nothing less than such a legal exposition of the existing law regarding the status of Great Britain and the Dominions. There are, however, authors who express the opinion that not the legal but only the conventional status of the Dominions is declared. This opinion finds no support in the words of the Report of the Imperial Conference: "they are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs." Can it be maintained that "any aspect" does not include "legal aspect"? I think it cannot. There is nothing in the Report of 1926 which gives support to such an interpretation of words in themselves not ambiguous but perfectly clear.

The Dominions are legally on an equal footing with Great Britain. They have acquired the legal status of Great Britain herself.

We are now confronted with the fundamental question: Is the old doctrine of the sovereignty of the British Parliament in connexion with the Dominions compatible with the legal equality of status as declared in 1926? Can the Parliament of Great Britain have an inherent, inalienable right of legislation over the whole British Empire, while the Dominions are in every legal aspect the equals of Great Britain? These principles are in my opinion in conflict. It is impossible to maintain the sovereignty of the British Parliament and at the same time to maintain the equality of the Dominions with Great Britain. Those authors who adhere to the old doctrine of parliamentary sovereignty therefore try to interpret the

Declaration of 1926 in such a way that the conflict disappears. They can, however, only do so by giving the Report a meaning contrary to the terms and wording of the Report itself. So it is said that the Declaration of Status of 1926 is not an exposition of the law as it was at that time, but of the law as it should be made by an Act of the British Parliament, and that it was nothing more than an agreement *de jure constituendo.* Professor Keith expresses himself as follows: " The assertion by the Conference of the absolute autonomy of the Dominions must, it is true, be regarded as a programme rather than a statement of fact." [1] This opinion is not supported by the terms of the Report which indicate a status already attained, not a status still to be attained.

" There is, however, one most important element in it (the Constitution of the British Empire) which, from a strict constitutional point of view, *has* now, as regards all vital matters, *reached its full development*—we refer to the group of self-governing communities composed of Great Britain and the Dominions. They *are* autonomous communities.

" Equality of status as far as Britain and the Dominions are concerned *is thus the root principle governing* our inter-Imperial relations."

It is clear enough that the above expressions premise a status already attained and not one still to be attained.

The statute law is of course not changed by the mere attainment of a status of equality by the Dominions. The Constitutions of the Dominions, the Colonial Laws Validity Act, the Merchant Shipping Act—these remain valid until they are altered in the regular manner. The statute law must be brought in accordance with the new status. That is self-evident. When the American Colonies became independent States, there existed Charters and Letters Patent by which the several governments were organized and which formed the Constitutions of these Colonies. They were, however, not wholly in accordance with the status of independence attained; they had to be changed. Their independence was, however, not acquired from the date of the amendment of the documents; on the contrary, the amendment of these documents was the necessary consequence of the attainment of the new status. Similarly, the acquiring by the Dominions of equality of status with Great Britain makes the amendment of the statute law unavoidable. This is not in any way prejudicial to the status of the Dominions already attained. The necessity for the change of the statute law is a consequence of that status; the status is not derived from the amended statute law.

A more serious objection, however, is made to the view that the Report of 1926 contemplates a status attained by the Dominions. How is it possible, it is asked, that a quite unofficial conference of Prime Ministers, a body entirely unknown to the British Constitution and the Constitutions of the several Dominions, and a body without any legislative power, is able to bring about such a fundamental change in the constitutional relations between the self-governing colonies and the mother country? As Dr. Baty queries: "Has the legislative omnipotence of the British Parliament been spirited away?"[1] To this objection the following answer can be given. There has not been any change of the law at all. The new status has been attained within the existing law. An analogous case in the private law is the attaining of majority—through the attaining of majority the law is not altered, only the status of the child is altered. The statement made by the Imperial Conference of 1926 is nothing else than this, that just as a minor in due time when he is grown up attains a higher status, the British settlements overseas and the conquered territories, which stand in the same legal position as these settlements, reach the same status as Great Britain as soon as they have become fully grown-up States. The fact that they have reached that status is the only thing set down by the Imperial Conference of 1926, thereby implying the existence of a rule of law making such a development in legal status possible.

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[1] *Dominion Autonomy in Practice*, p. 33.

The soundness of the legal rule implied by the Declaration of 1926 is a question about which difference of opinion can exist. Generally, however, the fact that the Declaration gives an exposition of Dominion status is accepted throughout the British Empire, and even the British Parliament can be said to have tacitly approved of it.

Still another objection is made to the view that the Dominions had attained their status of equality at the time when the Imperial Conference of 1926 made its famous declaration. Some authors contend that the words of the Statute of Westminster, 1931, do not support this view, that on the contrary, if the words of the Statute are taken in their ordinary sense, they do not allow of such an interpretation. According to this opinion the Statute of Westminster itself proves that the new status of the Dominions is derived from that Statute—"The Act itself is a singular assertion of the sovereign authority which still adheres to the Imperial Parliament," writes Professor Keith.[2]

I must concede that the words of the Statute of Westminster to a certain extent support the opinion that the Statute contemplates a grant of powers and not a statement of existing powers. *Vide* the following: ". . . the powers of the Parliament of a Dominion *shall* include the power to repeal or amend any such Act" (Act of Parliament of the United Kingdom) and "Nothing in this Act shall be deemed to *confer* any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia."

On the other hand there is no *grant* of extraterritorial power to the Dominion Parliaments, but merely a declaration of the existence of that power. "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation."

The Statute of Westminster appears, if the words alone are taken into account, in part to confer powers upon the Dominion Parliaments, in part to declare the existing powers of the Parliaments.

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[1] *Journ. Comp. Leg.*, vol. xii, pt. iv, p. 165.

[2] Quoted above, p. 47.

Is this interpretation correct? It denies the existence of the status of equality in 1926. A status existing in 1926 cannot be derived from a statute of 1931.

The Declaration of 1926, interpreted as acknowledging an existing status, comes into conflict with the Statute of Westminster. But in my opinion the Statute of Westminster does not lend itself to this interpretation. The only purpose of the legislature was to bring the statute law in accordance with the status of the Dominions. The intention of the Imperial Conference of 1930, which in substance drafted the Bill, and of the British Parliament, which enacted the Statute, must be supposed to be in strict conformity with the Declaration of 1926.

As regards the Union of South Africa, an alternative mode of bringing the statute law in accordance with the new status was open, viz. the amending of its Constitution, the South Africa Act of 1909. The Union has complete legal power of constitutional amendment, as admitted in the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929. As regards the Union it was not necessary for the competence of the Union Parliament to be determined by an Act of the British Parliament: that competence could legally be determined by our own Constitution. Once conceded that the Union of South Africa has attained equality with Great Britain, it follows that there are no legal limits to the power of amending our Constitution. The view expressed by Professor Keith, that the Statute of Westminster is an assertion of the sovereign authority of the Imperial Parliament, cannot, therefore, in my opinion be maintained.

The most important section of the Statute in respect of the question of the sovereignty of the British Parliament reads as follows: "No Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof." What is the meaning of this section? The words do allow of the interpretation that the British Parliament still has full power to make laws for the Dominions provided a clause is inserted that the Dominion concerned has requested and consented to it. But this interpretation cannot be accepted as sound. Even Professor Keith admits that the section concerned means a limitation of the competence of the British Parliament, but he calls the clause "nugatory," an attempt to accomplish the impossible, seeing that the Imperial Parliament, being sovereign, cannot bind itself.[1]

If, however, we do accept the principle that there are legal limitations to the power of the British Parliament, there is nothing startling in the clause. The British Parliament then merely made a declaratory Act concerning the legal limitations to its own power.

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[1] *Journ. Comp. Leg.*, vol. xiii, pt. i, p. 28.

# ORIGINS OF PROPERTY.

[*Contributed by* EDWARD JENKS, ESQ., D.C.L.]

WHILST it is true that lawyers, as such, are concerned mainly with property as a legal institution, *i.e.* with interests protected by legal sanctions, the origins of an institution in which they are so deeply concerned can hardly be a matter of complete indifference to them. Nor can they, it would seem, as good and intelligent citizens, ignore entirely the fierce and often dangerous controversies concerning the effects and character of property law which, especially in recent years, have caused violent changes in social and economic life. It may, therefore, be of interest to call attention briefly to a little work which has just appeared,[1] and which is at least a temperate and considered contribution to the somewhat scanty and not very satisfactory literature on the origins of property as an institution.

It is, of course, a commonplace of travellers, scientific and otherwise, that this institution, in clearly recognizable shape, is to be found, all over the world, in communities of every character, except in those rare and somewhat artificial communities which have been deliberately formed with a desire to extirpate it. And, even in these rare and artificial cases, the success of the experiment, regarded merely as an experiment, must, if we look at realities rather than at names, be regarded as extremely doubtful. For instance, Soviet Russia clearly recognizes a Law of Theft; and there can hardly be theft unless there is property, at least of some kind.

It looks, therefore, as though the institution of property, in some form or another, were so far essential to all kinds of human society, that the concept of property may be regarded as part of the make-up of the universal human mind, though the forms in which it expresses itself may vary infinitely with time and place. It is, consequently, idle to think that it can be disposed of by such superficial epigrams as Proudhon's well-known *dictum*: "Property is robbery." Indeed, as we have before suggested, robbery implies the existence of property; and Proudhon's robbers can only have robbed other robbers.

It is, admittedly, a difficult task to agree upon a definition of Property; and Mr. Beaglehole, though his suggestions are interesting, does not appear to have quite solved the problem. His considered definition (p. 132) suffers from the conspicuous defect of containing the word which it sets out to define. "Property, as we have considered it, may be defined as the appropriation, to persons capable of enjoying them, of goods or values satisfying fundamental human needs." But what is "appropriation" but a slightly longer word than "property"? The author of the book is happier when he approaches his subject by the safer path of induction. Property is that which affords satisfaction to the person who lays claim to it. Of course that is not enough; for objects which may afford us intense satisfaction, *e.g.* the open ocean, have never been the subjects of property. Property is that which arouses in its assertor an instinct of aggression or repulsion if his control of it is threatened. That also is, in normal cases, true; but again it is not enough. At any rate for lawyers and men of affairs, eyesight is not "property," though any attempt to deprive a man of it arouses resentment, and it is, in fact, protected by law in all civilized communities. Property is a fragment of the total equipment of the universe which has been, at least ideally, separated from the mass of that equipment. The fragment may be the product of an individual brain, as in the case of a song, or, to a slightly less degree, a painting. But the brain which produced it is part of the equipment of the universe; and a claim to copyright is, therefore, a claim to a fragment of that equipment. If we put these three predicates together, we arrive at a fairly good apprehension of the concept of property in its pre-legal stage. It is a fragment of the equipment of the universe which has become in some way attached to an individual (or to a group treated as an individual) for the satisfaction of his desires, and which he is prepared or, at least, anxious, to defend from attack.

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[1] *Property: A Study in Social Psychology.* By Ernest Beaglehole. (London: George Allen & Unwin, Ltd., 1931.)

Some such concept being, as we have said, a practically universal feature of the human mind, it is natural, in these evolutionary days, that an author seeking to elucidate the psychological origins of it should turn his attention to the pre-human stages of mental development; and, in his earlier chapters, Mr. Beaglehole examines the features in the world of animal life which would appear to contribute towards the appearance of the property concept in man. He studies the behaviour, in that order, of insects, birds, rodents, carnivores, and apes. Whether he has been exhaustive in his researches, it is, of course, impossible for anyone but a trained naturalist to be sure. But the tone and language of his work inspire confidence; and it is, therefore, interesting to note that he finds no evidence for the existence in non-human societies of anything that can fairly be called an "acquisitive instinct," *i.e.* an inherent tendency, independent of environment, to amass objects for the pleasure of amassing them. Here, of course, Mr. Beaglehole differs from certain distinguished psychologists, notably Professor McDougall.[1]

On the other hand, Mr. Beaglehole sees, in the behaviour of certain species, instincts whose expression looks like a desire for acquisition, such as that of wasps and bees and termites (food-storing), ants and termites (food-exchanging and cultivating), falcons, yellow buntings and lapwings (site-preservation), mice, squirrels, rats (nest-building and exchange), apes and dogs (monopoly of particular areas). In Mr. Beaglehole's view, these acts are, however, not induced by any special " instinct of acquisition," but by the primary and essential instincts of self-preservation and reproduction. In the more difficult and curious case of " collectors," *e.g.* magpies and apes, who carry off useless but bright and attractive objects such as beads, knives, and bits of glass, he still refuses to see any special " acquisitive instinct." He attributes these activities (which are found only among the higher animal intelligences) either to vanity or curiosity, or to a combination of both.[1] And he clinches the argument by an appeal to logic. It is not possible to develop an instinct for acquisition generally until the concept of property as a general source of value has been formed in the mind of the acquirer (pp. 88–9). Now it is impossible to arrive at this stage of mental development except by the aid of symbols (verbal or pictorial) ; [2] and, so far as we know, no creature below the rank of man employs symbols. This conclusion, though fortified by a reference to a less dogmatic statement by the late Professor Hobhouse, appears to be rather unconvincing.

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[1] *Introduction to Social Psychology*, pp. 87–8, 19th edn., 1924. (London: Methuen.)

When we reach the human stage of evolution, there is, admittedly, a change. Even the most rudimentary of human societies has a definite conception of property, which it endeavours to strengthen by an elaborate system of magic and sorcery. The taboo-mark (often assuming grotesque forms) is attached to objects which it is desired to appropriate ; and by means of it a widespread system of barter between the members of stranger communities, who could not meet without fighting, is peacefully carried on—the so-called " silent trade," admirably described by Mary Kingsley.[3] But even these primitive trade-marks are not essential to the protection of property in rudimentary societies ; for some of these at least have succeeded in drawing within the protection of their Law of Property products of the human brain which few civilized systems of law, it is believed, protect, *e.g.* incantations, enchantments, and mystic spells which have never been recorded in any permanent form. Mr. Beaglehole, when he wrote his book, could not, of course, be expected to be aware of the valuable evidence on this point more recently collected by Dr. Fortune in the Western Pacific, which, among many other interesting things, describes the precautions taken by the islanders of Dobu to prevent charm-stealing.[4] It is odd to realize that, at the other end of the evolutionary scale, the combined intellects of Western civilization have, for some years past, been striving, apparently with small success, to devise legal protection, or at least a share of the profits, for pure scientific discoveries which have been exploited for commercial ends.[1]

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[1] Lawyers familiar with criminal procedure will recognize these features in kleptomania cases.

[2] " No symbolism, no concept," is the rule of mental evolution (p. 89).

[3] *West African Studies*, pp. 241–6.

[4] R. F. Fortune, *Sorcerers of Dobu*, p. 107. (London : Routledge, 1932.)

Perhaps the most suggestive item in the new evidence is the fact that, in the primitive communities of the Western Pacific, a primary title to property involves, not merely an element contributed by the claimant (John Locke's "mixing of labour"), but a magical element as well, *i.e.* active participation by superhuman agency. Though Dr. Fortune's pages, written from the viewpoint of an anthropologist, do not answer all the questions which a lawyer would like to ask, it seems clear that, though his islands produce a certain amount of pork and fish, the chief food supply of the inhabitants consists of vegetables, especially yams, sago and taro, and fruit, especially bananas. Consequently gardens, and particularly trees, are objects of supreme importance, and are protected and cultivated by the aid of a most elaborate ritual, which is intimately connected with the social and economic organization of the community. Such property in gardens and trees as is recognized, is recognized because, in the belief of the community, the unseen powers have favoured the claimant's title; and the surest proof of this favour is the fertility of the object in question. Hence the importance of a correct ritual-treatment of trees and vines[2]—a treatment which may, of course, involve practices which a modern gardener would approve on scientific grounds.

One other striking institution of society in the Western Pacific is worth a word in connexion with property origins. This is the *Kula*,[3] or ceremonial voyaging for exchange purposes by crews from one island amongst the others. In the normal way, the relations between the different islands are suspicious, not to say unfriendly; but, at certain times of the year, expeditions conducted by strictly defined routes, and observing certain ceremonial practices, are welcomed. This procedure is, of course, an advance on the "silent trade," in which the parties do not come into the presence of each other; and the link between the two is to be found in an extraordinary custom by which articles of little material value but great æsthetic attractiveness are circulated among the traders under a rigorous and complicated set of rules, the most surprising of which, perhaps, is that which requires absence and an interval of time between the passing of the article from A to B and the return of an equivalent by B to A. The more attractive the article handed over without immediate return, the prouder the recipient, not because of his material advantage, but because the confidence in his honour thus manifested is a tribute to his magical powers and graces—in other words, as a modern business man would put it, his "credit." The actual trading comes at a later stage, and is, apparently, conducted on a cash basis. But the most successful merchant is usually the man with the greatest *mana* or magical power. A cynic might suggest that recent events in the commercial world have attested the still surviving influence of primitive notions.

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[1] *La Propriété Scientifique*, Institut International de Co-opération Intellectuelle. (Paris, 1929, League of Nations.)

[2] See, for examples, pp. 106–31 ("The Ritual of the Garden"), especially the incantations on pp. 121–5, in *Sorcerers of Dobu*.

[3] *Sorcerers of Dobu*, pp. 200–34.

The simple savage had, as a natural reaction from the Rousseau atmosphere and its associations, a bad time in nineteenth-century literature. But the rapidly accumulating evidence of anthropologists who have drawn their knowledge of Primitive Man, not from artificial theories of a Social Pact, but from patient study of surviving primitive communities, has done somewhat to re-establish his character.

This is not, of course, to suggest Primitive Man as a model for his successors. But no rational basis for a Law of Property can be found until the history of Property is known and understood. Property is an institution which has been profoundly influenced by psychological, social and political, as well as by economic motives. To take only two striking examples from the history of English Law. The rapid conversion of the feudal lord into an owner of his fief, though it was, perhaps, a rough practical compensation for the enfranchisement of his serfs, had, as its object and effect, the dominance for centuries of a particular class of the community; while the silent acceptance by the courts of the maxim, *cujus est solum ejus est usque ad inferos*, deprived the State of resources which would have enabled it, as time went on, to dispense altogether with the necessity for taxation, except in great emergencies. A well-known clause of the Statute of Merton [1] is usually accepted as authority for the first doctrine; though it is often not realized that both that Act and the supplementary clause of the Statute of Westminster the Second [2] speak only of disputes between freeholders, leaving quite untouched the far older title of the serfs or copyholders. The second doctrine seems never to have been formally laid down till quite modern times; though it is assumed (except as to "royal" mines) as unquestioned in the great *Case of Mines* of 1568.[3]

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[1] 20 Hen. III (1235) c. 4.

[2] 13 Edw. I (1285) c. 46.

[3] 1 Plowd. 310. The writer has made some little research into the Year-books to try to discover any case in which the point was raised. Probably a complete search would reveal something; but it is possible that the existence of coal outcrop, which could be worked from the surface and was so worked from early times, seemed to make the maxim a part of the "immemorial custom of the realm."

# A MODEL EXTRADITION TREATY.

[*Contributed by* ALBERT LIECK, ESQ.]

FROM time to time projects emerge for a general extradition treaty, or for a model treaty for general adoption by bilateral agreements. A draft convention was adopted by the International Law Association at Warsaw in 1928, and more recently a draft model extradition treaty was put forward by the Commission Pénale et Pénitentiaire.

The opinion of the Codification Committee of the League of Nations (the Hammarskjöld Committee) set up in 1924 was that extradition was not a matter ripe for regulation by a general international convention—a sound view.

All the objections to a general convention do not apply to a model treaty, which can of course be modified to suit the requirements of any pair of countries, or even any group of countries which choose to take it as the basis of their extradition practice. When the promoters of the model treaty speak of a " normal model extradition treaty applicable to all States with the same legal culture " they are dealing with something practicable. When they profess to aim at general agreement of all States " with an advanced legal system " they are undertaking a task which in the present condition of things is next to hopeless.

There is more than one fundamental divergency lying in the way of effective extradition arrangements between countries having the Anglo-American system of law, and those with what may be labelled the " Continental " system. These divergencies hamper the present scheme of things carried on under a network of bilateral treaties, and would not be removed merely by the negotiation of a general convention, unless that convention were preceded by considerable changes in the municipal law of the negotiating countries. The faults of the present scheme are due about equally to obstacles in the legal systems of the two contrasted groups of nations.

**Differences in the Law of Evidence.**—One very troublesome difficulty is caused by the highly artificial Anglo-American law of evidence, which, having been developed by judges in continuous contact with juries, has taken on a restrictive character alien to the Continental conception of evidence. Broadly, while French or German or Italian courts are prepared to admit material of all kinds as evidence, seeking to give each item its proper weight, in England and America every piece of evidence to which a jury might, owing to the infirmity of the human intellect, attach disproportionate importance, is either altogether excluded from consideration, or its admission is hedged about with conditions and exceptions.

English and American lawyers are apt to treat their law of evidence as something sacred in itself, instead of being, as it is, an instrument reasonably well designed to elicit truth and produce sound judgment in one particular form of inquiry, but unduly hampering and better disregarded in others.

The English law of evidence is very definitely part of the English adjective law relating to extradition. By s. 9 of the Extradition Act, 1870, the magistrate is to have " the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." S. 10 provides that, to justify committal for extradition, such " evidence must be produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England."

" The provisions of this Act " to which the above requirement is subject are contained in s. 14, which enables written depositions or copies of them, if duly authenticated, to be received in evidence ; but this modifies in no way the limitations on what is " evidence," as that word is technically used by the English lawyer. The statements in the depositions must be " evidence," and they must be on oath. Piggott [1] does indeed argue that " hearsay " should be admitted for what it is worth. As, however, " according to the law of England " it is worth nothing, this gets us no farther. In *R.* v. *Zossenheim* [2] Lord Alverstone said, " Foreign depositions ought to be most strictly scrutinized," and they are.

A typical recent instance, of which a brief note appeared in *The Times* of September 6, 1932, shows the kind of thing that happens. The accused was charged with obtaining goods by false pretences. The case presented by the German Government was one of a system of fraud extending over a long period, illustrated by numerous particular instances. Lengthy statements of co-defendants were transmitted to England, and they amply bore out the case for a system of fraud. These statements by German law could not be sworn ; by the English law could not be admitted without being sworn. The sworn evidence provided was scanty and proved one transaction only. There was nothing to prove the falsity of the pretence in this transaction standing alone, or the intent to defraud. So the accused was discharged, " according to the law of England." Probably no Continental tribunal would have found any difficulty in ordering extradition.

It is significant that during the last five years for which figures are published there were, according to the " Criminal Statistics," twenty-nine applications from foreign countries for extradition granted and twenty-two refused. The smallness of the total number of applications, which during the same period was only sixty-five (the balance being cases where either the fugitive was not found or the matter was otherwise disposed of), is partly to be accounted for by the strict control over aliens entering this country, but is no doubt also referable to the fact that such a high proportion of the applications made are refused as to discourage foreign governments from making more. Foreign judicial officials are inclined to ascribe the release of persons of whose guilt they hold substantial evidence to some perversity of the English mind. Many of them habitually fail to understand what is required by the English law, and give up as a bad job any but the most promising cases.

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[1] *Extradition*, pp. 153 and 154.

[2] (1903) 20 T.L.R. 121.

This difficulty of evidence might perhaps have a solution. The magistrates and judges who deal with applications for extradition do not have to work with juries. They are not trying offenders, but only deciding whether they should be committed for trial. If they were allowed to act upon the whole of the evidence submitted by the foreign judicial authorities, giving such weight as they thought proper to any part of it, free from the technical rules of the English law, it is probable that justice would be done on more refugees from justice than is at present possible. This suggestion is not so revolutionary as it seems. The jurisdiction in extradition is of an international nature, and international courts are not hampered by national adjective law. The Mixed Arbitral Tribunals, for instance, would have found themselves entirely unable to function had they been compelled to work under the English law of evidence. It is true that in criminal matters strict proof should be insisted upon, but our views on evidence are altogether too restrictive for a workaday world. With English magistrates and judges trained as they are in rigid traditions there would be no danger of undue weight being given to hearsay evidence. The requirement of an oath in judicial proceedings is a futile procedure in these days, and we are as likely to get truth in an unsworn as in a sworn statement. Even the penal sanction is not very valuable, with a law of perjury operating as capriciously as it does and must.

**Differences in Extent of Jurisdiction.**—Another wide difference between the States parties to extradition treaties is in the extent of their jurisdiction. Bound up with this is the almost more thorny question of the extradition or non-extradition of nationals.

England and the United States do not, generally speaking, admit penal prosecution in their courts for crimes committed outside their territory. The Continental nations do. Some, for example Italy and Turkey (borrowing from Italy), permit not only prosecutions for offences committed by their nationals abroad, but for offences committed by others within another sovereign State against an Italian national or a Turkish national, as the case may be. The two views came into conflict in the *Lotus* case in 1927 and the judgments of the members of the Permanent Court of International Justice show the two juridical notions sharply contrasted.

The Introduction to the Report of the drafting committee of the

Commission Internationale Pénale speaks of the United States and England as being among the "few exceptions" in this matter. But English jurisprudence is that of an immense territory and population, and, important from the point of view of extradition law, this territory and population are scattered over all the continents and islands of the world. If the vast area and millions of people of the United States be added, it is not easy lightly to dismiss countries limiting criminal jurisdiction to their own territory as almost negligible exceptions.

The corollary to the territorial limitation of jurisdiction is readiness to surrender nationals, and England at least has ever been ready to do this.

Most of our bilateral treaties provide for mutual optional extradition of nationals. In the treaty with the United States nationals are on the same footing as non-nationals. In other treaties provision is made for the extradition of British subjects, without reciprocity.

Countries, such as Italy, which will not extradite their own nationals are prepared to try them in their own courts for offences committed abroad. The *Gialdini* case is a recent instance of justice being done in this way. But it is an expensive method, and were we to alter our own law so as to give general jurisdiction over British subjects for crimes committed abroad, in practice they would be untriable. Were witnesses from abroad willing to attend in English courts, the expense would be prohibitive. Were they unwilling, no reasonable machinery of compulsion could be devised or worked. Not in measurable time could the English legal profession and Parliament be brought to admit the possibility of trying a person entirely, or almost entirely, on written evidence. The conflict of view as to what is "evidence" would also arise in an even more acute form than at present.

The arguments for and against the extradition of nationals are admirably set out in the Report of the Royal Commission of 1878 on Extradition.

The Royal Commission started with the obvious truth that mankind has a common interest in the suppression of crime, and that it is undesirable to leave criminals at large in the countries where they take refuge. Upon that basis they found it "obviously immaterial whether the fugitive criminal is a subject of the State demanding his surrender, or a subject of the country from which it is claimed."

But many States will not surrender their nationals, regarding it as a point of honour not to do so, and this view is embodied in their law, is sometimes even enshrined in a clause of a written Constitution.

"In favour of such a provision it is said that a man should not be withdrawn from his natural judges; that the State owes its subjects the protection of its laws, and that it fails in this duty if it hands over any of them to a foreign jurisdiction, and thus deprives them of the guarantees afforded by the law of their own country; that it is impossible to place entire confidence in the justice of a foreign State, especially with regard to the subjects of another country; and that it is a serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and his resources, and from those who would bear witness to his previous life and character."

" To this it may be answered, . . . that the offence is an offence against the law of the country in which it is alleged to have been committed. A person commorant in a foreign country owes obedience to its law in return for the protection which it affords him, as much as if he were one of its proper subjects. Why, because he has escaped beyond the jurisdiction of that law, should an offender, whose surrender is asked for, be in a different position from that in which he would have been in the country from which he has escaped ? Extradition, as a system, is based on the supposition that in the great majority of cases the persons whose surrender is claimed have, in fact, violated the law of the country demanding the surrender."

" As regards the suggestion that confidence cannot be placed in the justice of foreign tribunals, it is obvious that when we are inviting other nations to unite with us in a system of extradition, any restriction which implies a doubt of the competency of justice of their tribunals involves a striking inconsistency. Extradition is based on mutual confidence in the administration of justice by the courts of both nations. It proceeds on the assumption that impartial justice will be done to the party surrendered. We should be unwilling to surrender even a foreigner on any other assumption. It would be an affront to any nation to assume that when a foreigner is charged with an offence against its law its tribunals would not do justice to such foreigner as equally and impartially as would be done in the case of one of its own subjects."

It is perhaps not very practical to suggest that if the English law group removed the evidence difficulty the Continental group might do its share by removing the jurisdictional difficulty as to the trial of nationals. But moments of sweet reasonableness come even to sovereign nations, and there is no need to despair of eventual success.

**Listing or General Definition of Crimes.**—A lesser difficulty, but one capable of adjustment, is whether extradition crimes shall be crimes listed in or scheduled to a treaty, or be crimes falling within a general definition.

Listing is adopted in the draft of the International Law Association, and general definition by the drafting committee of the Commission Internationale Pénale. In all the bilateral treaties between this country and others the list method is adopted, and it is not likely that it will be abandoned. On the other hand, it should not be impossible to frame a general definition which would be satisfactory. The Fugitive Offenders Acts, which govern extradition within the British Empire, use the criterion of twelve months' or more imprisonment being the punishment by law within that part of the King's Dominions where the offence is committed. There is a further limitation that the extraditable offences are only those triable on indictment or information, a technical requirement not translatable into foreign law and unsuitable for a general or model treaty. A simple limitation by a minimum punishment would be sound enough, but some States punish a particular act or omission more severely than others, and the criterion ought to be the laws of both States having the required minimum. There would have to be other provisos. In England the making of a false customs declaration makes the declarant liable to two years' imprisonment on summary conviction. This offence certainly ought not to be extraditable.

Whether to proceed by general definition or by list does not seem to the writer a matter of the first importance. A well-drawn list would probably be about equal in effect to a well-drawn definition. Exact translations have not to be sought for each technical description of a crime. The sound practice, as adopted in England, is that the crime is an extraditable one if it is an offence against the laws of both the demanding and surrendering State, listed in the treaty, whether it be found described in translated equivalents placed beside one another in the two languages, or described under different heads. If the facts constitute a crime in the English list and a crime in the foreign list it is enough. Lord Russell C.J. laid down the law *in re Arton*[1]: "In my judgment, these treaties ought to receive a liberal interpretation. We are here dealing with a crime alleged to have been committed against the law of France, and if we find, as I hold that we do, that such a crime is a crime against the law of both countries, and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition." Again in *R.* v. *Corrigan*[2] it was said by the Court of Criminal Appeal, "The name of the offence does not matter a bit; every country looks at the facts."

In the English treaties the lists vary in content. The latest form is to be seen in the Anglo-Estonian treaty, *vide* the Order in Council of June 28, 1926. That list, though not perfect, shows the possibility of drawing up a comprehensive list.

If the treaty be general, a definition would be, though not a *sine quâ non*, yet very desirable. A model treaty might have both a general definition clause and a comprehensive list in the principal languages of the world, any pair of nations being at liberty to adopt either. If the list were adopted it would be open of course to modification in any particular bilateral treaty.

In the draft model treaty an attempt is made to get over a difficulty which lies in the nature of things and is only reflected in the various national laws. Certain acts are punishable by the laws of one State which are not punishable in another; they are *mala in se* and of a serious character in the one yet not in the other because of modifying conditions; or sometimes they simply cannot arise in the one though they can in the other. Thus the law of an inland country with no marine will naturally not provide for offences which can be committed solely in relation to ships. Again, the age of sexual maturity varies in different races, and what might be deemed to be and actually is serious sexual misbehaviour in one land would be innocent or venial in another.

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[1] [1896] 1 Q.B. 509.

[2] (1930) 47 T.L.R. 27; 22 Cr. App. R. 106.

The drafting committee, to meet this difficulty, drew an article which runs: "The requirement that the act shall also be punishable in the State applied to shall not be applicable if the laws of that State do not provide for that act merely on account of special external circumstances."

"Special external circumstances" is not a happy phrase. It is too foreign and is probably due to a translator insufficiently imbued with the spirit of the English language, and authors not realizing the British reluctance to embody in law general ideas needing wide phrases to express them. The French version is better, "circonstances spéciales, géographiques ou autres." Here it seems to the writer that the list method would be better, each pair of countries making their own list of crimes to be exceptions to the general rule. The idea embodied in the article is a useful one and ought not to be lost.

A critical examination both of the general convention and the model treaty mentioned above shows a number of smaller points which need discussion, but beyond remarking that the English translation of the model treaty, as presented in the Bulletin of the Commission Internationale, leaves something to be desired, we leave them to pass to another of the larger aspects of the matter.

**Preventive Measures.**—In the model treaty the field of extradition is sought to be widened by including in it proceedings for "preventive action" and for executing "preventive measures." There seems to be no objection to the extension if the preventive measures have been ordered or are to be determined by a court of justice on conviction for an extradition crime. Preventive measures are dealt with exhaustively in Title 8 of the new Italian Penal Code, from art. 202 of which it appears that they can be applied to "persons socially dangerous" for an act not made criminal by law. This would be repugnant to British notions. The French text of the memorandum explanatory of the model treaty says "le fait que la mesure de sureté n'a pas été prononcée par un tribunal ne saurait justifier le refus d'extrader." This is translated in the English version "the fact that *one* court *alone* is not entitled to take a decision," etc., a phrase not necessarily equivalent to the French. It is not clear whether the "competent authority" of which art. 1 of the model treaty speaks need be a court of justice. If it be not it is quite certain that England and States following English law would not assent to this part of the model.

"Preventive detention" has, of course, a limited technical meaning in English criminal law, being an additional sentence imposed on an habitual criminal convicted and sentenced to penal servitude, to commence at the expiration of the sentence of penal servitude.

**Political Offences.**—The embarrassing subject of "political" offences had to be dealt with, both in the draft general convention and the draft model treaty. The general treaty has: "the extradition of a person accused or convicted of a crime involving the loss of human life or grievous bodily harm under circumstances which, in the opinion of the judicial authority of the required Party (*i.e.* the State on whom the demand for extradition is made), would admit of extradition shall be accorded notwithstanding the political nature of the crime."

The model treaty says that " Murder, or attempted murder, of the Head of a State shall never be regarded as a political crime ; murder and attempted murder of other persons shall also not be so regarded if they are committed with special barbarity or cruelty."

The British views on this subject, as they were in 1878, are set out in the Report of the Royal Commission cited above. The words " offence of a political character " in the Extradition Act, 1870, were considered in the case of Castioni,[1] and the court adopted Stephen J.'s view,[2] that fugitive criminals were not to be surrendered for extradition crimes if these crimes " were incidental to and formed part of political disturbances," and this is a sound criterion.

There seems no good reason to give exceptional protection to the heads of States. If a monarch charged insurrectionists at the head of his troops and was killed, the killing would be murder (as well as treason), but it would certainly be a political offence, and it would be manifestly unjust to surrender a man whose shot in a battle in a civil war, he forming part of a body attacked and attacking, happened to kill the head of the State instead of a trooper behind him.

For the rest the English view of political crime meets all reasonable demands. In the case of Meunier [3] the accused was committed for extradition for murder and attempted murder, in one case by an explosion caused at Lobau Barracks. The court held that the outrage at the barracks was not an offence of a political character, to constitute which there must be two or more parties in the State, each seeking to impose the government of their own choice on the other. Anarchists' offences, it said, are not political, being in the main attacks on private citizens generally, rather than on governments or on members of any particular government as such.

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[1] [1891] 1 Q.B. 149.

[2] Given in his *History of the Criminal Law of England*, vol. ii, p. 71.

[3] [1894] 2 Q.B. 415.

# THE PROBLEM OF MINORITIES AND THE LEAGUE OF NATIONS.

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THE principle of the protection of minorities is by no means new. It has its historical, political, legal, social and economic background. In the history of European public law are found manifestations of an ancient tendency to defend the individual against the rule of force or of the majority, whether it be a question of oppression by the government or by a mob. The highest expression of this growing historical tendency can be found to-day in the minorities' provisions of the Peace Treaties, and the subsequent agreements based on it.

These provisions are the evidence of the development of the idea of democratic liberty and of the principle of the equality of all citizens before the law, providing for fundamental equality in legal rights. The historical background of these modern principles may be treated in two divisions: the more remote ideal development and the more recent, and rather more concrete, development.

The origins of the idea of the protection of the minority can be found in the principles of democracy and romanticism, if we disregard the problem of aliens, which became identified very early with the customs of public hospitality, international relations of the ancient States, and especially Greek and Roman consular and diplomatic relations.[1] Though democracy cannot be restricted to a single meaning, in our case it will be sufficient to define it as a form of government in which the exercise of sovereignty rests with the majority of the population. Though such democracy nearly always tends to the representative type of government, in which the governing power is concentrated in the few rather than in the many, and thus changes into oligarchy, theoretically political sovereignty is regarded as being vested in the masses of the population. Immediately other problems present themselves, such as the right of the rule of the majority, its good or bad aspects, representation of minorities, the problem of franchise, and, last but least, the reconciliation of democracy and liberty.

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[1] Thus the origin of commerce is closely related to the law of strangers or aliens. See C. Koehner, "The Primitive Commercial Law," in A. Kocourek & J. H. Wigmore (ed.), *Primitive and Ancient Legal Institutions* (Boston, 1915), p. 420; E. S. Hartland, *Primitive Law* (London, 1924), pp. 1 ff.; E. A. Westermarck, *The Origin and Development of the Moral Ideas*, 2 vols. (London, 1906–8); etc. The attitude of hostility and suspicion was by no means incompatible with kind and generous hospitality to strangers. For the practice and laws of the Jews, Greeks and Romans, see S. A. Cook, *The Laws of Moses and the Code of Hammurabi* (London, 1903); H. Shaeffer, *The Social Legislation of the Primitive Semites* (New Haven, 1915); C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols. (London, 1911).

**Rule of the Majority.**—The general will is the will of the community as a whole, and therefore it would seem that ideally the whole community should be unanimous in its decisions.[1] But experience shows, first, that it is rarely attainable ; secondly, that the effort to attain it involves endless delays, embittered conflicts and hopeless deadlocks ; and, thirdly, that even when secured it does not as a rule represent the general will at all, but rather some unsatisfactory decision therefrom forced upon the group by an obstinate minority or even a single individual. Thus the principle of the rule of the majority established itself as a necessary practical expedient.[2] Theoretically this expedient has commended itself to political thinkers and was accepted as one of the best and most satisfactory methods of ascertaining the General Will.[3]

But there are few things that have excited graver apprehension among students of democratic institutions than the possible and actual " tyranny of the majority."[4] The result might be tyranny, based on ignorance and apathy, passion and sentiment, smug self-satisfaction, racial antipathy, excessive patriotism, intolerance and persecution—all these manifestations being so well known and discussed in the world of States since four years were spent in bloodshed for the realization of democracy and then the following thirteen years in finding out that Mussolini, Pilsudski, King

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[1] As required, for example, in the Russian Mir, the Diet of the former Polish Kingdom, or English jury.

[2] See, for example, W. Lippmann, " Why Should the Majority Rule ? " in *Harper's*, vol. 152, pp. 399–405.

[3] Marsiglio of Padua, *Defensor Pacis*, part i, chap. xii–xvii (" Valentior para totam universitatem repraesentat.") ; J.-J. Rousseau, *Du Contrat Social*, livre ii, chap. ii (" Des Elections ") (Paris, 1907), pp. 278–83 ; Otto v. Gierke, " Über die Geschichte des Majoritätsprinzipes," in Schmoller's *Jahrbuch für Gesetzgebung* (Leipzig), 1915, vol. 39, pp. 565–87.

[4] Lord Acton, *History of Freedom and Other Essays* (London, 1907), p. 97 ; R. G. Gettell, *History of Political Thought* (N.Y., 1924), pp. 366–70, 382, 395, 452 ; H. M. Wiley, " Some Recent Critics and Exponents of the Theory of Democracy," in C. E. Merriam, H. E. Barnes, and others, *A History of Political Theories in Recent Times* (N.Y., 1924), pp. 46–79 ; J. Bryce, *American Commonwealth* (N.Y., 1914), vol. ii, chaps. lxxxiv–lxxxv, pp. 338–56 ; *Modern Democracies* (N.Y., 1921), vol. ii, pp. 159, 355, 411, 521, 549 ; A. L. Lowell, *Public Opinion and Popular Government* (N.Y., 1913), pp. 42–4 ; W. Duran, " Is Democracy a Failure ? " in *Harper's*, vol. 153, pp. 555–65 ; R. W. Child, " The Majority Man," in *Saturday Evening Post*, March 28, 1925, vol. 197, pp. 36–43, 189–94 ; L. Whipple, *The Story of Civil Liberties in the United States* (N.Y., 1927) ; M. J. Bonn, *The Crisis of European Democracy* (New Haven, 1925) ; L. Abbot, *The Rights of Man* (Boston, 1902), pp. 285–9 ; E. Elliot, *American Government and Majority Rule* (Princeton, 1916) ; D. S. Jordan, *Democracy and World Relations* (Yonker-on-Hudson, 1918), pp. 93–4 ; H. Lee McBain, " Does a Minority Rule America ? " in *The New York Times*, June 7, 1931, section 5 ; H. Baker-Crothers and R. A. Hudnut, *Problems of Citizenship* (N.Y., 1924), pp. 359–96 ; Z. Chafee, *Freedom of Speech* (N.Y., 1920) ; etc.

Alexander and others have the power to convince many of us that anti-democratic practices have been less expensive and more practicable.

That the rule by majority had to be curbed in some respects was evident even to the founder and fathers of the United States Constitution, which, in one sense, is made up mostly of provisions for the protection of minorities. Essentially the problem of minorities, in general, is the question of fundamental human rights, equality in legal rights, social and economic opportunities. In other words, a democratic State provides for the principle of equality, though this assumption cannot be carried too far without encountering the essentially religious basis of the doctrine, which put its belief more on a faith that transcends experience, and was so well summed up by Dewey: " In every individual there lives an infinite and universal possibility—of being a king and a priest." [1]

**Problems of Nationalism.**—The more recent origins of the clauses for the protection of minorities can be traced to the problems of nationalism. From the democratic idea of liberty of the individual it is only a step to the demand for the liberty of a nation—the principle of self-determination, to form an independent State. Modern nationalism, fused with patriotism, according to an authority,[2] propounds a two-fold doctrine: (1) that each nationality should constitute a united independent sovereign State; and (2) that every national State should expect and require of its citizens not only unquestioning obedience and supreme loyalty, but also unshakable faith in its surpassing excellence over all other nationalities.

The popular belief that every nationality has a right to statehood sprang from the precepts and practices of the French Revolution and from the Napoleonic era.[3] The European revolutions of 1848 seemed to bring to a focus those two great principles of the nineteenth century—democracy and nationalism—the principles underlying the basis of the protection of minorities.

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[1] This also includes the idea that inalienable, inherent and sacred rights of the individual are of religious origin. See G. Jellinek, *The Declaration of the Rights of Man and of Citizens* (trans. M. Farrand, N.Y., 1921), chap. vii, " Religious Liberty in the Anglo-American Colonies the Source of the Idea of Establishing by Law a Universal Right of Man," pp. 59–77. J. Bryce, *Historical Aspect of Democracy* (London, 1867), p. 273, says: " The democracy in its true sense is the product of Christianity whose principles, asserted from the first and asserted until now, have been the spiritual equality of all men before God." C. F. Kent, " The Birth of Democracy," in *Yale Review*, 1919–20, vol. 9, pp. 131–42, expressed it as follows: " Consequently the ' Kingdom of God ' may be more exactly described as the ' Democracy of God.' " That the democratic principle is essentially religious in its character is asserted by the following writers: J. MacCunn, *Six Radical Thinkers* (London, 1910), p. 198; *Ethics of Citizenship* (Glasgow, 1894), pp. 4–5; F. C. Hearnshaw, *Democracy at the Crossways* (London, 1918), p. 34; E. Kant, *Metaphysics of Ethics* (London, 1907), § 1; W. H. Mallock, *The Limits of Pure Democracy* (London, 1919), pp. 347–8; C. J. H. Hayes, *A Political and Social History of Modern Europe* (N.Y., 1924), vol. ii, p. 101; A. Abbot, *The Rights of Man* (Boston, 1902), pp. 336–45; J. Bryce, *Modern Democracies*, vol. i, pp. 60–1.

[2] C. J. H. Hayes, *Essays on Nationalism* (N.Y., 1926), pp. 23 ff.

[3] *Ibid.*, pp. 23–6.

We must notice, however, that in practice the application of the maxims of both nationalism and democracy contradict each other and often come into actual conflict. While the ideas of self-realization developed themselves in the spirit of nationalism, which is nothing else than the extension of this fundamental idea from the limited sphere of the individual to a group which constitutes a nation, the spirit of both democracy and nationalism often degenerate to the level of dogma and metaphysics. They become all-inclusive, according to their own evaluation and can go so far as to lose all ethical values and the sense of proportion which is so needed for reality. Both become absolutely selfish and consider themselves as the ultimate end of all creation. For example, from this viewpoint any minority can ask—and they actually do ask—for the materialization of the beautiful promise of " self-determination."

Fortunately enough, the actualities of the post-war world partly changed such tendencies. The Peace Conference acted on the basis of the present system of the world—the State system. The primary law and the duty of every State is self-preservation. Even more, every State must be constituted in such a way as to keep on living, to observe its international obligations and not to become a menace to society because of its chronic weakness and instability. The physical impossibility of having each minority incorporated into a new State system according to its own wishes, because of the limits in the conditions of existence and the vital interests of society, is certainly indisputable fact. Sometimes a group is too small to stand alone ; sometimes the mixture of people may defy separation ; sometimes a State has strong historical reasons for keeping a territory with its minority population. All these reasons, however, do not justify the *status quo* of to-day. Justice is so ephemeral and based on so many factors of consideration. The redrawing of the map of Europe of to-day could not solve this problem. Anybody who knows the mind of both the minorities and the majorities must be convinced that both are attributing religious convictions to their claims.

But as the provisions of the Peace Treaties could not carry the promises of democracy and nationalism to the logical conclusion, the makers of the new world order adopted another ingenuous system of the " Minorities Treaties," which protect certain defined minorities of some States against the excesses of the nations, which hold the reins of government in these States.

Consequently the problem of protection of minorities means the connexion of two principles : the principle of nationality, so far as nationalism is concerned, or rather the nationality which has the majority, and the principle of civil and religious liberty and equality, so far as the members of the State are concerned, who differ from the majority in their language, race, nationality or religion. In practice, this " equality " gives certain rights to minorities, which may be classified as " privileges " as we shall see later.

**Present System.**—The present system of the protection of minorities did not appear suddenly on the international horizon of 1918–19. On the contrary, it had been foreseen not only in the religious teachings but also in the political and legal development of the past centuries. The makers of the Peace Treaties of 1919–20 followed closely what already had been created in the sphere of international law. "It has for a long time been the established procedure of the public law of Europe that when a State is created, or even when large accessions of territory are made to an established State, the joint and formal recognition by the Great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government."[1]

But there is a marked difference between the pre-war and post-war systems. There were no minorities treaties in our modern sense before the Versailles Conference—that is, the protection which would relate to all the minorities in certain States, guaranteed by a body like the League, as is the case to-day. There is also a more careful distinction of rights given to the minorities, and besides religious differences, attention is given to racial and linguistic distinctions. Another very important difference, which is disputed very bitterly, consists in the fact that the pre-war treaties were confined to affording protection to individuals considered separately, while the post-war category grants protection to minorities, regarding them as collective groups or organized units. But in every case we must keep in mind that the protection concerns only the citizens of the same State, and not aliens and foreigners who are guaranteed certain freedom and privileges, not belonging to the citizens.

**Evolution of pre-War Protection of Minorities.**—To deal exhaustively with the historical background of these pre-war Treaties is impossible and perhaps unnecessary, since there is a long list of books which deal more or less adequately with this background.[2] It might be sufficient to say that the first collective treaty among European States, the Peace of Westphalia, attempted to solve the problem of religion in general, though according to the principle *Cuius regio, eius religio*.[3] But a certain protection of religious freedom was provided for, especially for the Protestants in Catholic States.[1] On the other hand, as a whole, the Peace of Westphalia did not encourage the protection of minorities ; the States were to be unified, rather than divided.

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[1] Letter addressed by Clemenceau to Paderewski, transmitting to him the treaty to be signed by Poland under Art. 93 of the Treaty of Peace with Germany. Reprinted in *International Conciliation*, no. 222, September 1926.

[2] See, for example, J. Fouques Duparc, *La Protection des Minorités de Race, de Langue et de Religion* (Paris, 1922); I. K. Evans, "The Protection of Minorities," in *The British Year Book of International Law*, 1923–4 (Oxford, 1924), pp. 95 ff.; D. Krstisch, *Les Minorités, l'Etat et la Communauté Internationale* (Paris, 1924); A. Mandelstamm, "La Protection des Minorités," in Académie de Droit International, *Recueil des Cours*, 1923, tome i, pp. 364 ff.; M. Vichniac, *La Protection des Droits des Minorités dans les Traités Internationaux de* 1919–20 (Paris, 1920); H. Rosting, "The Treaties for the Protection of Minorities by the League of Nations," in *The American Journal of International Law*, 1923, vol. 17, pp. 641 ff.; H. W. V. Temperley, *History of the Peace Conference of Paris* (London, 1920–4), vol. v, etc.

[3] See the text in *Recueil des Traités de Paix* (Amsterdam, La Haye, 1700), vol. iii, p. 541.

The real beginning of the international protection of minorities can be considered to be the peace concluded on May 3, 1660, by Poland and Sweden, in which Sweden agreed with Poland to respect the Catholic religion of the newly acquired inhabitants.[2] Similar provisions can be found in numerous other treaties of peace of the seventeenth and eighteenth centuries, though with some differences. Very detailed are the provisions of the Treaty of Paris between England, France and Spain of February 10, 1763, by which Canada and other American territories were ceded to Great Britain.[3] While Catholics received their protection in this document, the Protestants were protected in the Versailles Treaty of September 3, 1783, which ceded some American territories to France.[4]

Other examples could be given. In general, these agreements were concluded between the Protestant and Catholic States. But specific instances appear also between two States of the same religion, viz. between two Catholic States, in one of which the religious liberty was greater than in the other.[5] In fact there was not a treaty in the eighteenth century between States of different religion that did not contain clauses about religious matters. Practically they were also an expression of the practice of intervening in the internal affairs of other States in religious matters. It must also be noticed that the provisions did not concern so much the principle of equality of religions as the practice of tolerance. The religious minorities usually lacked political and civil rights.

At the end of the eighteenth and in the nineteenth century the religious differences were disappearing from the public law of Europe and American States. Religious protection was becoming less a problem of international law and thus the causes were being removed for intervention. Furthermore, all the treaties of the seventeenth and eighteenth centuries do not establish the principle of obligations for the whole territory of the State, but for only a certain and limited territory ceded by one State to another. It was only the Congress of Vienna of 1815 which extended this protection to the entire State and applied it to Holland and Belgium.[1] In addition, the equality of all creeds was provided for.

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[1] Compare especially Art. V, s. 12 & s. 13 ; also s. 2.

[2] The text can be found in J. B. Boehmius, *Acta Pacis Oliviensis Inedita* (Vratislaviae 1773–6), vol. i, p. 154. Art. IV, s. 2 reads as follows : " Quod religionem catholicam eiusque exercitium in Livonia Sueticæ possessionis attinet, omnes incolae Livoniae subditique illi religioni addicti, omni securitate gaudeant, ac conscientia libera, religione, devotioneque sua, domi, sine inquisitione vel animadversione, privatim utantur."

[3] The text can be found in Martens, *Recueil des Principaux Traités* (1791), vol. i, p. 33. Art. IV reads as follows : " En conséquence, Elle (Sa Majesté Britannique) donnera les ordres les plus précis et les plus effectifs, pour que ses nouveaux sujets catholiques romains puissent professer le Culte de leur religion, selon le rit de l'Eglise Romaine, en tout que le permettent les loix de la Grande Bretagne. . . ."

[4] Art. VII, in Martens, *op. cit.*, vol. ii, p. 462.

[5] Treaty of September 18, 1773, between Maria Theresa and Poland. Text in L. Neumann, *Recueil des Traités et Conventions Conclus par l'Autriche* (Leipzig, 1855–78), vol. i, p. 30.

Parallel with the protection of religion in Christian States, there was developing the practice of protection of Christianity in Turkey. From about the first half of the sixteenth century, the European States were concluding the so-called capitulations with Turkey, beginning with the French capitulation of 1535.[2] Protection was provided for the citizens of European States visiting Turkey, or residing there, but not for Turkish citizens. But such positive provisions were applied to the relations of Turkey to the lands of the Habsburgs, Poland, Venetia and Russia.[3] Especially in the Kutchuk-Kainardji Treaty of July 10–21, 1774, the Turkish Government promised to protect the Christian religion, and Russia was allowed to make diplomatic representations to the Porte on behalf of the Constantinople cathedral, and the realization of religious toleration in Bessarabia, Moldavia, Wallachia and other territories returned to Turkey.[4] This led to frequent interventions by Russia.

The provisions for the international protection of Turkish minorities followed in the next century. It was mostly the Eastern question which concerned itself with the protection of religious minorities in the nineteenth century. The problem was ignored by the Congress of Vienna of 1815. But as a result of the gradual dissolution of the Turkish Empire, five new States (Greece, Serbia, Rumania, Bulgaria and Montenegro) were formed. In each case the recognition of these States had been the subject of consultation between the Great Powers, and had been accompanied by certain conditions, the object of which was to ensure religious freedom.[1] As late as 1856 Turkey was admitted to the Concert of Europe on the condition of the issuance of a firman for the benefit of the Sultan's subjects. But it was stated that this was to give the Powers no right to interfere collectively or separately in the relations of the Sultan with his subjects, or in the internal administration of Turkey.[2] Hence, in a way, the Treaty was a negation of the principle of protection of minorities.

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[1] Annex to Art. 8, Treaty of May 31, 1815, in *State Papers*, vol. 2, p. 141. See J. de Ridder, " La Liberté de Conscience en Droit International," in *Revue de Droit International et de Législation Comparée*. 1905, Series I, vol. ii, pp. 283–302; M. J. Kohler, " Jewish Rights at the Congresses of Vienna (1814–15), and Aix-la-Chapelle (1818)," in *Publications of the American Jewish Historical Society*, No. 26, 1918, pp. 33–126, and especially p. 71.

[2] C. E. Noradoughian, *Recueil d'Actes Internationaux de l'Empire Ottomane* (Paris, 1897), vol. i, pp. 83 ff. Compare the British capitulations of 1675 on p. 146, Hollandish of 1680 on p. 169 and Prussian of 1761 on p. 315. It is interesting to note that these rights, the origin of which may be traced to the privilege granted by Harun al Rashid to the subjects of Charlemagne, were the results of the good-will displayed by Oriental sovereigns, who granted them of their own free will. France was granted special privileges in connexion with the Holy Places in and around Jerusalem, renewed on several occasions, notably in 1740. In 1607 it was agreed that Christians of all nations represented at Constantinople by an ambassador should be under French protection. Such intervention in the affairs of Turkey gave rise to many of the most serious episodes in the later relations between Turkey and the Powers. The renewed capitulations of 1740 gave many privileges to French subjects in the Ottoman Empire, including the control of the Holy Places in Palestine, which was to be immediate cause of the Crimean War. See T. A. Walker, *A History of the Law of Nations* (Cambridge, 1899), p. 116; Great Britain, *Peace Handbooks* (London, 1920), vol. iii, No. 15, " The Balkan States," pp. 8 ff.

[3] Noradoughian, *op. cit.*, vol. i, p. 182; *Recueil des Traités de Paix*, vol. iv, pp. 167, 172.

[4] Arts. 16, 17, 23, 10; Noradoughian, *op. cit.*, vol. i, p. 319.

Similar to the Turkish treaties were those concluded by the European States with China and Japan in the eighteenth and especially in the second half of the nineteenth century. The treaties with Japan resemble strongly the capitulation treaties with the Porte.[3] Strictly speaking the Japanese treaties protected the religious interests of the aliens; but in the treaties with the United States of July 29, 1858, and with Holland of October 16, 1857, Japan agreed to abolish customs offending Christianity. In China the Great Powers brought pressure upon the Government to allow the practice of Christianity even to Chinese subjects. The result was the Imperial edict of February 20, 1846;[1] this decree was put under international guarantee in the French-Chinese treaty of October 25, 1860.[2]

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[1] It was on the occasion of the establishment of the Kingdom of Greece that this precedent began. When the Kingdom of Greece was recognized, the Powers after special provisions for the protection of the Catholic religion added the following paragraph: "The Plenipotentiaries of the three Allies' Courts (Great Britain, France and Russia) being desirous moreover of giving Greece a new proof of the benevolent anxiety of their Sovereigns respecting it, and of preserving that country from the calamities which the rivalry of religions therein professed might excite, agreed that all the subjects of the new State, whatever may be their religion, shall be admissible to all public employments, functions and honours, and be treated on the footing of a perfect equality without regard to difference of creed, in all their relations, religious, civil or political" (*State Papers*, vol. 17, p. 202). This principle was reaffirmed: in 1863, when the Ionian Islands were ceded to Greece, and the new arrangements were embodied in a separate treaty between Great Britain, France, Russia and Denmark; when Thessaly was ceded to Greece by Turkey, 1881, the transference was effected by a Treaty to which Great Britain, Austria, France, Germany, Italy and Russia were parties (Arts. III, VIII). The same principle was maintained when Moldavia and Wallachia were established as autonomous principalities (Protocol of Constantinople of 1856, Arts. XIII, XVIII; Convention of Paris, August 10, 1858, Art. 46). The Congress of Berlin of 1878 laid down that countries requesting to be admitted to the comity of European nations would be recognized only on condition that differences in religion should not be made the basis of discrimination in civil and political rights. This principle was recognized in the Treaty of Berlin by Bulgaria, Montenegro, Serbia, Rumania and Turkey.—Treaty of Berlin, July 13, 1878. *State Papers*, vol. 69, pp. 749–68 (Bulgaria—Art. V, Montenegro—Art. VII, Serbia—Art. XXXV, Rumania—Art. XLIV).

[2] E. Herstlet, *The Map of Europe by Treaty* (London, 1865–91), vol. ii, pp. 1250–65.

[3] The treaty with Holland of October 16, 1857. Text in Martens, *Nouveau Recueil*, vol. xvi, 2nd part, p. 405; with England of August 26, 1858, in *ibid.*, p. 439; with France of October 9, 1858, in *ibid.*, p. 439; with the United States of July 29, 1858, in *ibid.*, vol. xvii, p. 51; with Portugal of August 3, 1860, in *ibid.*, 2nd ser., p. 21; etc.

Thus the evolution of the pre-war protection of minorities can be summarized as follows: The practice of the protection of minorities began casually in the treaties for the cession of territories. Only certain religious minorities were protected in the ceded territories. The agreements were not guaranteed by other States. Then the protection was extended to all forms of religions, and, finally, by the Treaty of Berlin, these agreements were put under the collective guarantee of the Great Powers. It must be noticed that all States did not sign the minorities treaties; only States suspected of weakness by the Great Powers, *e.g.* Turkey or China, and the newly formed States of the Balkan Peninsula, as well as the colonies in western Africa.[3]

**The Peace Treaties.**—The Peace Conference of 1919 built up a new system for the protection of minorities in certain States. Without going into the discussion of various influences which brought about the formulation of these provisions,[4] we can rather definitely assume the general causes leading to their realization. First of all, the makers of the Peace Treaties were influenced by humanitarian considerations. They wanted to prevent the persecution of minorities, and especially of the Jews in the Central European and the Balkan States. Then came the pacifistic considerations: to make the new structure of Europe as safe as possible and to eliminate the dangers hidden in the dissatisfaction of the oppressed nationalistic and religious factions. Finally, there was a rather unsuccessful attempt to save the formal sovereignty of the States from being violated.

From the legal sense the concept of the protection of minorities means the sum total of rules and institutions which are to protect minorities against any oppression from the State and to guarantee to the minorities a certain freedom of liberty or equality. Naturally the word "certain" is changeable in its actual application and has only relative value. There are no absolute values in this regard; each protection of minorities tries to equalize the difference which exists from the legal point of view between the majority and the minority. In other words, it tries to equalize the legal position of the majority and the minority. The legal position of the majority should thus represent the greatest possible attainment of the rights of the minority.

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[1] Martens, *op. cit.*, vol. ix, p. 64.

[2] *Ibid.*, vol. xvii, p. 44.

[3] *Ibid.*, 2nd ser., vol. x, p. 414.

[4] See L. Luzzatti, *God in Freedom* (N.Y., 1930), pp. 734–94; N. Feinberg, *La Question des Minorités à la Conference de la Paix de* 1919–20 *et l'Action en Faveur de la Protection Internationale des Minorités* (Paris, 1929); Temperley, *op. cit.*, vol. v, pp. 432 ff.; R. S. Baker, *Woodrow Wilson and the World Settlement* (Garden City, 1923); *La Lutte des Juifs Européens pour leurs Droits Civils et Nationaux* (Paris, 1925); D. H. Miller, *The Drafting of the Covenant* (N.Y., 1928), 2 vols. In this connexion we must consider the invaluable privately printed twenty-one volumes constituting the diary of David Hunter Miller. Other unprinted and valuable material is cited in Luzzatti, cited above.

The legal bases of the protection of minorities were provided by the signature of the so-called " Minorities Treaties " by the Principal Allied and Associated Powers on the one hand and ten States respectively on the other. The rights of minorities originate from Arts. 86 and 95 of the Treaty of Versailles, which are the sources of the Treaties of June 28 and September 10, 1919, the first concluded between Poland and the Principal Powers and the second between those Powers and Czechoslovakia. The principles were embodied in the ten original treaties, and subsequently confirmed and applied in five declarations, two conventions and three bilateral treaties.

# A COMPARISON OF THE GENERAL PRINCIPLES OF CRIMINAL LAW IN ENGLAND WITH THE *PROGETTO DEFINITIVO DI UN NUOVO CODICE PENALE* OF ALFREDO ROCCO. IV.

[*Contributed by* W. T. S. STALLYBRASS, ESQ., D.C.L.]

## PART IV. ABSENCE OF JURISDICTION.

EVEN if an act be in every other respect a punishable crime it may be dispunishable in England because the courts have no jurisdiction. The jurisdiction of the courts may be negatived because of (i) the person of the offender, (ii) the lapse of time, (iii) the place in which the crime was committed.

(i) **The Person of the Offender.**—(*a*) The King and his servants. The King is exempt from the jurisdiction of the criminal courts.[1] They have no coercive power over him.[2] " If the King should in his passion kill a man, this shall not be felony to take away the King's life." [3] Blackstone, the great eighteenth-century exponent of English law, ascribed [4] the King's immunity to an imaginary perfection of the will which renders him incapable of *mens rea*. But the rule is in truth due not to this absurd fiction, but to lack of jurisdiction in the courts.[5] If the maxim that " the King can do no wrong " were confined to the King in his public capacity it would be theoretically unexceptionable. Applied to the King in his personal capacity it is theoretically unsound, and it is difficult to see how it can be justified on the grounds of practical convenience.[6]

Yet there must be some chord in human nature to which it answers, for Italian law goes even farther. The King, the Queen and the Regent are all exempt from criminal jurisdiction by internal public law by a reference to which they are exempted under the *Progetto definitivo*.[7]

It is a fundamental principle of English constitutional law that the immunity of the King does not in general extend to his servants. But there are certain statutes which do not bind the King and in some cases the result is that his servants can claim immunity. The general rule is that the Crown is not bound by the provisions of any statute unless expressly or by necessary implication named therein. But to this rule there is an exception: "the King is impliedly bound by statutes passed for the public good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong."[1] This covers most cases of crime, but not all. Where the Crown is not bound the protection enures to the benefit of persons acting within the bounds of their authority and employment under the Crown.[2] Such cases would be limited to offences of the type of *contravvenzioni*.

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[1] *Per* Erle C.J., in *Tobin* v. *R.*, (1864) 16 C.B.N.S. 310.

[2] *Cook's* case, (1660) 5 St. Tr. 1077.

[3] Trial of *King Charles I*, (1649) 4 St. Tr. c. 1034.

[4] *Commentaries*, iv, 32. Cp. Manzini's theory of incapacity: Ferri, *Pr. di Diritto Criminale*, pp. 233, 398.

[5] See on this subject, Ehrlich, *Proceedings against the Crown*, pp. 44–9; Zane, " A Legal Heresy," in *Wigmore Celebration Essays*, p. 255.

[6] G. L. Haggen, in 41 L.Q.R., p. 186.

[7] Art. 3.

(*b*) Foreign sovereigns are also exempt, but for a different reason. Their immunity is due to the comity of nations.[3] It ceases, therefore, if they are deposed, exiled or fugitive in England.[4]

(*c*) It is not certain whether the ambassadors of foreign States, their servants and retinue, whilst resident in this country are liable to its criminal jurisdiction or not.[5] The better opinion seems to be that they are not. "The security of ambassadors is of more importance than the punishment of a particular crime."[6]

In practice these immunities seldom cause any injustice or inconvenience; usually the offending members of a minister's suite are sent to the local tribunals for trial, the minister waiving his privilege; in other cases the ambassador himself collects the evidence and sends the offender home for trial to his own country.[7]

Art. 3 of the *Progetto definitivo* provides for the exemption from criminal responsibility of persons excepted by international law, and in the *Relazione*[8] we are told that this covers the Pope and the heads of foreign States, and ambassadors and certain other representatives of foreign States to whom according to treaties or international usage diplomatic immunity belongs.

(*d*) By the Bill of Rights, 1689, no member of either House of Parliament can be made criminally liable for anything said by him in his place in the House whilst the House is sitting.[9] But in all other respects members of Parliament are subject to the ordinary rules of criminal law.[1]

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[1] Chitty, *Prerogative*, 382.

[2] *R.* v. *Kent Justices*, (1889) 24 Q.B.D. 181; *Gorton Local Board of Health* v. *Prison Commissioners*, (1887) [1904] 2 K.B. 165, note.

[3] *The Parlement Belge*, (1880) 5 P.D. 197. Cp. Thornely, in *British Year Book of International Law* (1926), pp. 125–7.

[4] *R.* v. *Mary Queen of Scots*, (1586) 1 St. Tr. 1161.

As to non-liability for unlawful acts done in the territory of a foreign State on behalf of that State authorized by the authorities of that State, see Harrison Moore, *Act of State*, pp. 120–2; *Princess Olga Paley* v. *Weisz*, [1929] 1 K.B. 718.

[5] Cp. Stephen, *Hist. of Criminal Law*, vol. ii, pp. 3–4.

[6] Blackstone, *Commentaries*, vol. i, pp. 253–4; Halsbury, *Laws of England*, vol. vi, p. 429; Kenny, *Outlines* (12th ed.), p. 79. *Contra* Halsbury, *op. cit.*, vol. ix, p. 245; Thornely, *op. cit.*, pp. 127–8.

[7] Stroud, *Mens Rea*, pp. 323–4 and the cases there cited.

[8] Vol. i, p. 27.

[9] Cp. Statute of 1512; 4 Hen. VIII, c. 8; *ex parte Wason*, (1869) L.R. 4 Q.B. 573.

The privilege accorded to defamatory statements made in judicial proceedings and to fair reports thereof [2] rests on a different basis: it is a particular case of privilege and in no way due to lack of jurisdiction. This is a subject dealt with by Art. 606 of the *Progetto* on similar lines to English law.

(*e*) Acts of State. An act of State is an act which amounts to an injury to some person *not a British subject* and resident outside the King's dominions, done by a British subject, previously sanctioned or subsequently ratified by His Majesty's Government.[3] When the act is an act of open war there is no doubt that it is not a justiciable crime. It is probable that such an act done in time of peace is also not a crime. It is well settled that such an act will not give rise to civil proceedings in tort for damages.[4] And "it is impossible to suppose that a man should be a criminal when he is not even a wrong-doer. . . . The principle is that the acts of a sovereign State are final, and can be called in question only by war, or by an appeal to the justice of the State itself. They cannot be examined into by the courts of the State which does them." [5] It is "a case rather of the inability of the court than of the disability of the suitor." [6]

(**ii**) **Lapse of Time.**—The general rule of English criminal law is expressed in the maxim *nullum tempus occurrit Regi* [7]: Governor Wall [8] was tried nineteen years, William Horne [9] thirty-five years after the murders they had committed. But there are many objections to punishing persons long after the commission of the offence—at any rate where the offender has not withdrawn himself from justice. The party may be deprived of the means of vindicating his innocence or of proving the attendant circumstances of extenuation; the crime may be forgotten or a mere matter of tradition; the offender may have become a different moral being; the punishment has lost its efficacy for the purpose of example. Judges and juries are therefore in such circumstances reluctant to convict.[10]

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[1] *Bradlaugh* v. *Gossett*, (1884) 12 Q.B.D. p. 283.

[2] Archbold, *Criminal Pleading* (12th ed.), pp. 1251–2.

[3] So Stephen, *Hist. of Criminal Law*, vol. ii, p. 61. Cp. Harrison Moore, *op. cit.*, p. 93. It would, however, be better to say that an act of State is an act sanctioned or ratified by His Majesty's Government, and that such an act constitutes no cause of action if it causes injury to a non-resident alien. It is not in reality the character of the act, but the legal remedy, which is affected by the status of the person injured.

[4] *Buron* v. *Denman*, (1848) 2 Ex. 167.

[5] Stephen, *Hist. of Criminal Law*, pp. 61–5. Cp. Keir and Lawson, *Cases in Constitutional Law*, pp. 295 *sqq.*; Harrison Moore, *Act of State*, pp. 40–2, 93–9.

[6] *Per* Lord Sumner in *Johnstone* v. *Pedlar*, [1921] 2 A.C., p. 290. Cp. the trial of Capt. Neumann in Mullins, *Leipzig Trials*, p. 106 (*per cur.*).

[7] Coke, *Inst.*, vol. ii, p. 373.

[8] (1802) 28 St. Tr. 51.

[9] *Annual Register*, vol. ii, p. 368.

[10] Wills, *Circumstantial Evidence* (6th ed.), pp. 310–11. Cp. *Relazione*, vol. i, pp. 206–7.

But the courts have power to prevent a case going to the jury if they think the prisoner has been unfairly prejudiced by the delay,[1] which must be accounted for,[2] and it will also be taken into account in measuring the punishment.[3]

In addition statutes have now imposed a time limitation in the case of particular crimes within which proceedings must be taken. Of these the most important are treason (three years by the Treason Acts, 1695 and 1708—except for attempting to assassinate the King), offences under the Riot Act, 1714 (one year), unlawful carnal knowledge of girls between 13 and 16 (twelve months by the Criminal Law Amendment Act, 1928), and, in the absence of a special rule,[4] six months is the limit for offences punishable on summary conviction.

Art. 161 of the *Progetto definitivo* fixes a scale of time-periods for prescription, proportioning them to the gravity of the offence and taking into account aggravating and extenuating circumstances, and pecuniary penalties. The general principle is that the time necessary to prescribe is equal to the maximum punishment (and therefore there is no prescription when the offence is punishable with death or penal servitude for life),[5] but in no case is it less than five years for *delitti* or two years for *contravvenzioni*. Speaking generally we may say that for serious crimes the period is shorter, for minor offences longer than in England.

But in the case of a private prosecution (*querela*) [6] and in the case of those offences in respect of which no prosecution may be instituted without a demand of the authorities or the injured person,[7] the limitation is three months from the day on which the authority or the injured person was informed of the fact constituting the offence and in no case must more than a year elapse after the offence. Other provisions are contained in Arts. 162–5.

Neither in England [8] nor under the *Progetto* [9] is the day on which the offence was committed reckoned in computing the time.

Rocco has no doubt simplified the law and as a general principle it is admittedly true that the period of prescription should be correlative to the gravity of the crime. But that does not appear to me to be the only consideration. In certain types of charge, easy to bring, difficult to answer, evidence may disappear more easily than in others, and in such cases as sexual offences the prisoner may be more unfairly prejudiced by postponement of his trial than in cases of fraud, where documentary evidence may remain just as convincing after many years have elapsed. And it is in the former cases, grave as they may often be, that one would expect public resentment to manifest itself most speedily and spontaneously.

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[1] *R. v. Robins*, (1844) 1 Cox 114.

[2] *Per* Lord Mansfield C.J., in *R.* v. *Robinson*, (1765) 1 Wm. Bl. 541.

[3] 156 L.T.Jo. 343.

[4] As under the Sale of Bread Act, 1836, 48 hours or a reasonable time.

[5] *Relazione*, vol. i, p. 207. Cp. *Beccaria*, c. xxx.

[6] Art. 128.

[7] Art. 132.

[8] *Radcliffe* v. *Bartholomew*, [1892] 1 Q.B. 161.

[9] Art. 14.

**(iii) Limitation of Jurisdiction by Territory.**—By English common law crime is essentially territorial. "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed."[1] "All jurisdiction is properly territorial, and *extra territorium jus dicenti impune non paretur*."[2] Such is the fixed rule of common law. No criminal proceedings can be taken in this country for a crime committed abroad;[3] but over crimes committed in England the common-law courts have jurisdiction even if committed by aliens only temporarily resident in this country,[4] including perhaps prisoners of war.[5] Such persons are treated as owing a temporary allegiance to the Crown.[6] But no such doctrine can apply to an alien enemy who is not yet a prisoner of war.[7] Protection and allegiance are co-extensive. But allegiance as the sole foundation of jurisdiction has perforce been in fact abandoned.[8]

But statutes have made some inroads upon the rigidity of this common-law rule. Statutes have in certain cases given English courts jurisdiction to deal with crimes committed by British subjects abroad. The chief of these offences are: treason by a statute of 1543,[9] murder and bigamy by the Offences against the Person Act, 1861, offences against the Official Secrets Act, 1911, and under the Explosive Substances Act, 1883, acts maliciously done outside the United Kingdom to cause an explosion in the United Kingdom likely to endanger life or to cause serious injury to property, and conspiracies of the same kind.[10]

No statute gives English courts jurisdiction over foreigners for offences committed on foreign territory, with one unimportant exception.[11]

But by common law there is one important exception to the general rule. By common law piracy *jure gentium* is justiciable anywhere.[12] Pirates are *hostes humani generis*. Further, in certain cases Powers have mutually conceded to each other by means of international conventions the right to exercise extra-territorial jurisdiction in criminal matters, *e.g.* the conventions relating to submarine cables and those relating to the white slave traffic and obscene publications.[13] Such wrongs may be called *delicta juris gentium*.[14]

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[1] *Macleod* v. *A.-G. for N.S.W.*, [1891] A.C. 455.

[2] *Surdar Gurdyah Singh* v. *Rajah Faridkote*, [1894] A.C. 670.

[3] *R.* v. *Hooper*, (1734) W. Kel. 190.

[4] *R.* v. *Barronet*, (1852) 1 E. & B. 1.

[5] *Moliere's* case, (1758) Fost. 188 n. *Contra R.* v. *Johnson*, (1809) 29 St. Tr., p. 398; *R.* v. *Lopez*, (1858) D. & B., p. 543.

[6] *Per* Lord Campbell C.J., in *R.* v. *Tchorzewski*, (1858) 8 St. Tr. N.S. 1091.

[7] *Perkin Warbeck's* case, (1500) 7 Co. Rep. 6 b.

[8] Beckett, in *British Year Book of International Law*, vol. vi, pp. 51–2.

[9] 35 Hen. VIII, c. 2.

[10] For other statutory provisions, see Kenny, *Outlines* (12th ed.), pp. 419–20.

[11] Seamen, who have been within three months employed in a British ship: by the Merchant Shipping Act, 1894, s. 687.

[12] *R.* v. *Dawson*, (1696) 13 St. Tr. 454; *A.-G. for Hong Kong* v. *Kwok-a-Sing*, (1873) L.R. 5 P.C. 179.

[13] *Relazione*, vol. i, p. 35.

[14] *Relazione*, vol. i, p. 38; Ferri, *Principii di Diritto Criminale*, pp. 157–8.

Now let us turn to the *Progetto definitivo*. After providing that the Italian criminal law is binding on all who are in " the territory of the State," citizens or foreigners, subject to the exceptions fixed by Italian public law and international law, and on all citizens or foreigners who are abroad, in the cases specially provided,[1] it proceeds to give a definition of " citizen " and of " territory of the State." [2] " Citizen " for the purposes of the criminal law [3] includes citizens of the colonies, colonial subjects, those belonging by origin or election to places subject to the sovereignty of the State and stateless persons residing in its territory. The territory of the State includes the territory of the Kingdom, of the Colonies or of any other place subject to the sovereignty of the State, and Italian ships and aircraft are deemed to be State territory, wherever they may be, unless they are subject, by international law, to a foreign territorial law. The *Progetto* is silent upon the subject of the difficult question as to what are territorial waters.[4] Clearly territorial waters, whatever they may be, are a " place subject to the sovereignty of the State." The air, which has also raised interesting problems of international law, also comes within these words.[5] I suppose that should Italy accept a mandate, mandated territories would also be within the expression.[6]

English law does not recognize the doctrine of extraterritoriality as applied to merchant vessels, and claims jurisdiction over foreign merchantmen in English harbours and land-locked waters whilst allowing for the concurrent jurisdiction of the flag-state with the State in whose territory the crime is committed. Most European continental countries, whilst not basing their law upon the doctrine of extraterritoriality, renounce jurisdiction over matters of internal discipline on board merchant ships in their harbours, and expect their merchantmen when abroad to receive the same immunity from local jurisdiction. This divergence of view has led to a certain amount of international friction.[7] The *Progetto definitivo* deals with this difficulty in a satisfactory way. It leaves the determination of the question to international law, not to the law of a foreign State, which would be incompatible with Italian sovereignty, but, if necessary, to the Permanent Court of Justice at The Hague.[8]

Similar problems arise in connexion with aircraft, and here also England would probably claim concurrent jurisdiction, the solution arrived at by M. Travers.[9] The International Air Navigation Convention of 1919 did not make any provision with regard to crimes other than those connected with navigation, and the true law applicable cannot therefore be stated with certainty. The *Progetto* leaves this question also to be settled by international law.

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[1] Art. 3. [2] Art. 4. [3] See *Relazione*, vol. i, p. 28.

[4] Cp. Hurst, in *British Year Book of International Law*, vol. iii, p. 42 ; *ibid.*, vol. ix, p. 120 ; Hall, *International Law* (8th ed.), pp. 190 *sqq.*

[5] *Relazione*, vol. i, p. 30 ; McNair, *The Law of the Air*, ch. 1.

[6] Hall, *op. cit.*, p. 163 ; *contra* Stoyanovsky, *Mandate for Palestine*, pp. 163–4. See also Brierly, *The Law of Nations*, p. 102. Cp. R. D., August 20, 1923, Art. 1.

[7] See on the whole topic Charteris, in *British Year Book of International Law*, vol. 1, pp. 45 *sqq.* Cp. Ferri, *Principii di Diritto Criminale*, p. 154 ; Brierly, *The Law of Nations*, pp. 115–18.

[8] *Relazione*, vol. i, p. 30. [9] *Le Droit Pénal International*, s. 283.

Art. 6 is a clear affirmation of the territorial character of crime. " Everyone who commits an offence within the territory of the State is punished according to Italian law." It continues: " The offence is deemed to be committed within the territory of the State when the action or omission constituting it occurred therein, wholly or in part, or when the event which is the consequence of it took place therein." This is a wider claim than is recognized in English law. English law claims jurisdiction in all cases where the *direct* results of a crime take place within the territory.[1] There is both an Objective and a Subjective territorial jurisdiction; the objective is where jurisdiction is claimed by reason of the locality of the act, subjective where it is claimed by reason of the locality of the actor. English law recognizes a subjective territorial jurisdiction where any overt act is committed inside the territory.[2] In such cases there may be a concurrent jurisdiction in two different States.[3] " The importance of the recognition of the objective theory by the defenders of the strict territorial doctrine can from the point of view of international law hardly be over-estimated." [2] The true basis of the theory is the right of self-defence. " Everything which produces as its direct results harmful consequences inside its boundaries is a blow at the social order, which it is the *raison d'être* of every State to conserve." [4] But English law does not carry the objective-territoriality theory so far as the *Progetto*.[5] If an act is done by a foreigner outside English territory, the foreigner is not amenable to English criminal jurisdiction, merely because some consequence of the act may take place in England, *e.g.* if a foreigner strikes someone abroad and the person struck comes to England and dies of the blow, there is no crime which is cognizable in England.[6] Again, an intentional blow takes place where it falls: a negligent blow does not.[7]

So far, however, there is nothing in the *Progetto definitivo* which departs substantially from principles recognized by English lawyers. It is when we come to Arts. 7 to 11 that we find provisions which in the light of the common law are inconsistent with its view of international comity and obligation. These articles assert jurisdiction over offences committed abroad by Italian citizens and by foreigners. So far as the

[1] Co. Inst., vol. ii, p. 318; *R.* v. *Coombes*, (1785) 1 Leach 388; *R.* v. *Oliphant*, [1905] 2 K.B. 67; *R.* v. *Nillins*, (1883) 53 L.J.M.C. 157.

[2] *E.g. R.* v. *Holmes*, (1883) 12 Q.B.D. 23; Beckett, in *British Year Book of International Law*, vol. viii, p. 121, note.

[3] Beckett, in *British Year Book of International Law*, vol. vi, p. 54.

[4] Beckett, *op. cit.*, p. 55. Cp. Travers, *op. cit.*, pp. 10, 73.

[5] Cp. M. Bourquin, *Crimes et Délits contre la Sûreté*, in *Recueil des Cours de l'Académie de Droit International*, vol. xvi (1927), pp. 168–73.

[6] *R.* v. *Lewis*, (1857) 7 Cox 277; Halsbury, *Laws of England*, vol. ix, p. 273.

[7] *R.* v. *Keyn*, (1876) 2 Ex. D. 63; Beckett, *op. cit.*, vol. viii, pp. 106 *sqq.*; Judge Moore in the *Lotus* case: Publications of Permanent Court, series A, collection of Documents No. 10, pp. 82 *sqq.*; Brierly, in 44 L.Q.R., pp. 157–8.

assertion of jurisdiction over a State's own citizens is concerned, that is entirely a matter for the State itself, but the extent of a State's criminal jurisdiction over foreigners is a matter which must be determined by the law of nations.

The *Progetto* divides such cases into two groups. In the first group the offences are justiciable even if the defendant be not in Italian territory; in the second group jurisdiction is only asserted if the defendant is in Italian territory.

The first group contains political offences, and these are subdivided into two classes. Under Art. 7 crimes against the personality of the State, counterfeiting the seal or currency and abuse of office by public officials in the service of the Italian State are justiciable without any special conditions. *Delicta juris gentium* regarding which special dispositions of law or international conventions provide for the applicability of Italian law fall under the same head. Under Art. 8 all other political offences are justiciable on the request of the Minister of Justice.

These astonishingly wide claims are justified on the ground of the duty of the State to protect its own interests, " its own existence, its own development and its own prestige abroad," whoever and wherever the man may be who offends against them.[1] They are an extreme assertion of the claims of Fascism in reaction against the " historical sentimentalism " of the liberal State which was the product of the French revolution.[2] The extent of the claims is increased by the extraordinarily wide definition of " political offence." " Any crime is a political crime which offends a political interest of the State, or a political right of a citizen. Likewise an ordinary crime, determined wholly or in part by political or social motives, is considered to be a political crime." [3] Clearly this interpretation of " political offences " will apply to Extradition Treaties. But Fascism looks with disapproval at the exclusion of political offences from such treaties. It is an " anachronism " due to " historical sentimentalism " and " the ferment of political distrust which is wont to hide under the mantle of even the most favourable international relations." [4] Art. 13 dealing with extradition departs from precedent and makes provision for no such exclusion. This tendency is not likely to meet with much favour in England, at any rate whilst the present Soviet government is in power in Russia.

These cases of political offences, over which in one form or another most continental States claim jurisdiction even though the offence be committed by a foreigner abroad, are usually regarded [5] as an exception to the territorial principle. But a brilliant young English writer has

[1] *Relazione*, vol. i, pp. 27, 36.

[2] *Ibid.*, vol. i, pp. 39–41.

[3] Art. 8. In *Re Castioni*, [1891] 1 Q.B. 149 the court refused to give an exhaustive definition, but held that in order to bring an offence within the meaning of the words " of a political character " it must be incidental to and form part of political disturbances.

[4] *Relazione*, vol. i, pp. 41, 52.

[5] *E.g. Relazione*, vol. i, p. 36.

recently suggested [1] that they need not be regarded as exceptions at all in view of the objective theory of territorial jurisdiction. "Must not all acts which menace the safety or credit of a State be acts which produce their effects, or some of them, inside the territory? If so, there is no conflict. The right to punish is indisputable. . . . This is so in the great number of cases [2] and the difference between the practice of say Great Britain and France in this respect is not nearly so wide as it appears at first sight. All the most serious dangers to a State's safety or credit are covered in this way." Apart, therefore, from the recognition of the possibility of trial *per contumace* in such cases Englishmen are, perhaps, not likely to take serious objection to the provision of Arts. 7 and 8.[3]

The second group contains ordinary crimes, and here a distinction is made between citizens and foreigners. In the case of citizens found in Italian territory, who have committed an offence abroad, they are in all cases punishable in Italy, but if the offence was one punishable with less than three years' imprisonment as a minimum, only on the request of the Minister of Justice or on the complaint of the injured party.[4] In the case of foreigners such request or complaint is always a condition precedent to a trial in Italy, and the only crimes justiciable are those where the minimum punishment is one year or more.

It can scarcely be doubted that such legislation will not approve itself to English lawyers. "Whether laws of this nature are good internationally," said one of England's foremost international lawyers, Hall,[5] "whether, in other words, they can be enforced adversely to a State which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported." And Hall's view has been supported by some French opinion,[6] as well as by most English writers.[7] Speaking of the claim to jurisdiction in cases of injuries done to nationals by a foreigner abroad, Beckett says: [8]

> There are many theoretical objections to such jurisdiction. In the first place, the social order of their national State is not disturbed by crimes committed upon them, which produce no effect within its boundaries. Secondly, the man who, on his own business, enters a foreign country places himself under the protection of the foreign State, of whose community he temporarily

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[1] W. E. Beckett, in *British Year Book of International Law*, vol. vi, p. 56. Cp. M. Bourquin, *op. cit.*, p. 173.

[2] But not quite all: W. E. Beckett, in *British Year Book of International Law*, vol. vi, p. 47.

[3] See, however, Brierly, *The Law of Nations*, pp. 146, 148 (quoted *infra*, p. 86). Cp. M. Bourquin, *op. cit.*, p. 174, note 1.

[4] Art. 9.

[5] Hall, *International Law* (8th ed.), p. 263.

[6] Fauchille, ss. 264, 267².

[7] Lawrence (7th ed.), pp. 221–3; Westlake (Peace), pp. 261–3; Oppenheim, vol. i, s. 147.

[8] *Op. cit.* p. 58. Yet these cases, according to the *Relazione*, vol. i, pp. 37–8, fall under Art. 7 (5) and are not ordinary crimes under Arts. 9 and 10. Beckett's argument therefore applies *a fortiori* to ordinary crimes.

forms a part, and on that protection he must rely, subject always to his national State's right to insist that legal machinery of moderate efficiency shall be exercised impartially on his behalf. If the criminal escapes to his national territory, extradition can remove him to the place whose social order his crime has infringed and by whose laws he ought to be tried. It must be admitted that this claim to jurisdiction has not received international sanction.[1]

So the French courts rightly rejected the efforts made to punish Germans for the ill-treatment of French prisoners in Germany.[2]

The objective-territorial theory will not cover claims such as these. Professor Brierly has recently well said:[3]

> The objective-territorial theory does not meet at all the claim of some States to jurisdiction over crimes committed abroad against nationals, and it requires a much closer causal connexion between the act in one State and its effect in another than is required by the theory which gives jurisdiction over all acts abroad which a State may choose to regard as directed against its security or credit.

The Permanent Court of International Justice in the *Lotus*[4] case refused to decide upon the validity of such provisions in international law, but Judge Moore held them to be "contrary to well-settled principles of international law."

Yet Englishmen are apt to forget that other countries have gone nearly as far as the *Progetto* in the same direction.[5] And there is force in the claim that international conventions are tending strongly to treat crime as a matter of international concern.[6] In so far as normally such offences are only to be tried on the request of the Minister of Justice, it may be hoped that conflict or friction over these provisions is unlikely to arise.

It is noteworthy that the Italian penal law applies even though the offence be not a crime in the place where the act took place. This is at first sight somewhat startling,[7] but it seems to follow logically if the foundation of criminal jurisdiction is the defence of a State's social order. "A State's own criminal laws are the expression of its own views as to what endangers its social order, and other nations' conceptions of the laws necessary to protect themselves are irrelevant."[8]

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[1] M. Bourquin, *op. cit.*, pp. 174–9, attempts to controvert some of Beckett's arguments.

[2] Travers, *Le Droit Pénal International*, p. 97.

[3] *The Law of Nations*, p. 148.

[4] Publications of Permanent Court, series A, Collection of Documents No. 10; Brierly, in 44 L.Q.R. 160–3. See also the conservative view taken in the Report of the Sub-Committee for the Codification of International Law on Jurisdiction over Extraterritorial Crime (1926) in 20 *American Journal of International Law* (July Supp.), pp. 253–9.

[5] Hall, *op. cit.*, pp. 261–2; Beckett, *op. cit.*

[6] Cp. Travers' monumental work in six volumes, *Le Droit Pénal International*, and his subsequent *L'Entr'aide Répressive Internationale* (1928).

[7] *Machado* v. *Fontes*, [1897] 2 Q.B. 231; *R.* v. *Ellis*, [1899] 1 K.B. 241.

[8] Beckett, *op. cit.*, p. 59.

In fine, that the State should claim jurisdiction, whatever the nature of the crime, to try a foreigner not in the State territory for an offence committed abroad is the enactment that is most alien to English conceptions of law and justice.

Art. 11 also offends an Englishman's view of international comity, although the principle is found also in Ferri's Project.[1] It is a deep-rooted feeling with Englishmen that fair play demands that full effect should be given to the maxim *nemo debet pro eadem causa bis vexari.*[2] "A final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction: therefore if A, having killed a person in *Spain*, were there prosecuted, tried and acquitted, and afterwards were indicted here, he might plead the acquittal in *Spain* in bar. As in the case of Mr. *Hutchinson*, who had killed Mr. *Colson* in *Portugal*, and was acquitted there of the murder; and being afterwards apprehended in *England* for the same fact, and committed to *Newgate*, he was brought into the Court of King's Bench by *Habeas Corpus*, where he produced an exemplification of the Record of his acquittal in *Portugal*; but the King being very willing to have him tried here for the same offence, it was referred to the consideration of the Judges, who all agreed, that as he had been already acquitted of the charge by the law of *Portugal*, he could not be tried again for it in England."[3] And as with an acquittal so a previous conviction in a foreign court will be a good answer to any further proceedings in England.[4] "A judgment of a foreign court of competent jurisdiction is," says Beckett,[5] "apparently, universally respected as a final conclusion of the matter by a rule of international comity, if not of law." But that which King Charles II of England failed to persuade his judges to do for him in the case of Mr. Hutchinson, Rocco has done for the Minister of Justice. Art. 11 of the *Progetto definitivo* provides that where the offence is committed in Italian territory, the offender, citizen or foreigner, will be tried again in Italy even if he has already stood his trial abroad, and that in cases of crimes committed abroad he shall be tried again at the request of the Minister of Justice. It is true that in such cases any sentence which he has already served abroad will be deducted from any fresh sentence which he may have to undergo.[6] But that is all!

Foreign judgments are also recognized in establishing recidivism, or habitual or professional criminality or a tendency to crime, accessory punishments, measures of security and so forth.[7]

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[1] Art. 6.

[2] Even when technically permissible: "it is contrary to the whole spirit of British justice"; *per* Humphreys J., in *R.* v. *Moxon*, *The Times*, April 4, 1930.

[3] 1 Leach 135, note (*a*). Cp. *R.* v. *Aughet*, (1918) 13 Cr. Ap. R. 101.

[4] Russell, *Crimes* (8th ed.), p. 1816. [As to the application of this principle in civil proceedings see article by Mr. Mesritz *infra* at p. 89.—Ed.]

[5] *Op. cit.*, p. 59.

[6] Art. 142.

[7] Art. 12.

Rocco's *Relazione*[1] dots the i's and crosses the t's of this article :

> In no case and by no title can recognition be given to a foreign judgment so as to preclude the application of Italian law and the exercise of our jurisdiction. . . . The justification of the principle is clear in the cases provided for by Arts. 7 and 8[2] of the present Project. It is a question of crimes which may have injured our most vital political interests, and therefore it is quite inconceivable that the exercise of the right or repression on the part of the State, which is the exercise of its sovereign power, could be in any way subordinated to conditions dependent upon foreign pronouncements, which similarly are manifestations of sovereignty on the part of the foreign State from which they come. But recourse may be had to the same reasoning in the case of the other crimes, provided for in Arts. 9 and 10;[3] in their case also complete autonomy as regards foreign States in the exercise of the right of repression on the part of the State, incontestable in point of law, may prove opportune for the more efficacious penal protection of the important interests of the State and its citizens, or even for accomplishing the work of justice as against strangers, refugees in our country, whenever it proves impossible to free ourselves of them in advance.

This seems a somewhat extreme and unfortunate development of Fascist principle, and to smack not a little of the " ferment of international distrust " which in other respects the *Relazione* so admirably condemns.

[1] Vol. i, p. 44.

[2] *Ante*, p. 160.

[3] *Ante*, p. 190.

[*To be continued.*]

# ENGLISH LAW IN THE DUTCH COURTS.

[*Contributed by* M. I. MESRITZ, ESQ., *Advocate, Amsterdam.*]

THE following notes upon a series of proceedings by Dutch firms against a British naval officer over a long period may be of interest as illustrating the way in which continental courts deal with English law and judgments of the English courts.

**Kuhne's Case.**—This case, which has won a certain notoriety among Dutch lawyers as " the fur coat case," was first tried in the English courts under the denomination *Strauss & another* v. *Platt & others*.[1] The facts may be briefly stated as follows. The plaintiffs, a drapery firm of The Hague (Holland), sought to recover from the executors of a deceased gentleman a large sum of money which they said was due to them for goods supplied on the deceased's order to a lady with whom he was living at that time. The deceased was an officer of the British Navy, who was taken prisoner at Antwerp and subsequently interned at The Hague. The defence was that the goods were supplied, to the knowledge of the plaintiffs, in order to induce the lady to have and/or to continue to have immoral intercourse with the deceased gentleman. After evidence had been given for the plaintiffs, Mr. Justice Rowlatt, on June 7, 1921, stopped the case and dismissed the action on the ground that the case fell within exactly the same category as *Pearce* v. *Brooks*, (1866) L.R. 1 Ex. 213, as it must be inferred from the bill sued for, which was one of " appalling profligacy," that the goods delivered were simply part of the wages of a woman who, as the plaintiffs knew quite well, was an expensive courtesan.

The judgment was appealed from on the ground that there was no evidence before the learned judge which justified him in drawing such inference, but it was upheld, without counsel for the respondents being called upon, by the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), on October 26, 1921. It was held that there was abundant material upon which the learned judge could come to the conclusion stated, and though *Pearce* v. *Brooks*[2] and *Upfill* v. *Right*[3] were both cases in which the action was brought against the lady, the ruling of Chief Baron Pollock in the first case applied directly to the case under consideration.

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[1] The judgments have not been reported in England. By the courtesy of Messrs. Bakker & Van Kuyk, The Hague, who acted as legal advisers to the defendants in the Dutch courts, I have been able to read the shorthand transcripts of the proceedings in London.

[2] *Supra.*

[3] [1911] 1 K.B. 506.

So far about the English case. As it was put by Lord Justice Bankes in the beginning of his judgment, it was " a matter which really turns on a question of fact." The Dutch case, on the contrary, turned essentially on a question of law, at least in its first phases.[1]

In this case the same plaintiffs sued the same defendants for an important item of the bill stated, viz. a sable (fur) coat sold for 40,000 guilders (about £3,333). The defendants pleaded that the action was barred by the decisions contained in the English judgments and counterclaimed the amount of costs for which judgment in their favour had been given in London. Judgment for the defendants was entered again on the claim and counterclaim in the decision first cited, which on appeal was upheld by the superior courts,[2] on somewhat peculiar grounds which were afterwards severely criticized by two leading Dutch learned writers.

The main ground for dismissing the plaintiffs' action was not that the English decisions constituted a *res judicata* in Dutch law; on the contrary, it was held that the Dutch Codes do not contain any provision to such effect. The Dutch Court of Appeal held that the contractual relations between the plaintiffs and the defendants' testator had to be construed according to Dutch law and that, consequently, there remained considerable doubt whether under that law the contract had an illegal consideration. The court, however, did not stress the point further, as it ruled that the plaintiffs, by voluntarily submitting their case to the jurisdiction of the English courts, must accept all consequences of such procedure and were therefore " on principles of good faith and reasonableness " debarred from challenging the decisions obtained by bringing the same action in the Dutch courts. This would only have been otherwise, had the English judgments been " contrary to Dutch public policy," which the courts held was not the case.

Some comment needs to be added in order to explain to foreign readers these decisions and the criticism they evoked. Firstly, the judgment of the Supreme Court is a purely negative ruling by reason of the peculiarly formal character of this court's procedure, which is in the nature of French " cassation," allowing appeals on point of law only if the precise section of the statute which it is alleged the Court of Appeal has violated or wrongly applied is explicitly indicated. This made it possible for one of the learned critics already alluded to[3] to suggest that the Supreme Court might have allowed the appeal on the issue of " public policy" provided some other section of the Civil Code which *he* thought covered the question had been formally relied on.

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[1] It was reported as *Kuhne & Zonen* v. *Platt & others* in the following decisions: 1. District Court of The Hague, April 10, 1923; *Nederlandsche Jurisprudentie*, 1923, p. 969; 2. Court of Appeal, The Hague, January 14, 1924; *Weekblad van het Recht*, No. 11150; 3. Supreme Court of the Netherlands, November 14, 1924; *Nederlandsche Jurisprudentie*, 1925, p. 91; *Weekblad van het Recht*, No. 11301; 4. Supreme Court of the Netherlands, January 6, 1928; *Nederlandsche Jurisprudentie*, 1928, p. 311; *Weekblad van het Recht*, No. 11784.

[2] Judgments cited under Nos. 2 and 3.

[3] Professor Star Busmann, in his footnote to judgment No. 3, *Weekblad van het Recht*, No. 11301.

Here the second observation to be made presents itself. It is fairly certain that the plaintiffs' claim, had they brought it at once before the Dutch courts, would have succeeded, as in Dutch law no illegal consideration appears to exist. This has actually been held by the same courts in *Saakes*' case.[1] As Professor Star Busmann points out, it is only the subject-matter of a contract itself which may render it unenforceable in Dutch law, and mere motives more or less apparent in the mind of the parties or one of them cannot avoid an otherwise perfectly legal agreement. Thus, in the present case, the sale of goods to a lady on a gentleman's undertaking to pay for them would undoubtedly have been held to be valid as, according to the legal view taken in this country, the motives of the gentleman in doing so are no concern of the seller.

A further observation to be made concerns the ground on which the courts held the English judgments to be binding on the unsuccessful plaintiffs, viz. the requirements of "good faith and reasonableness."[2] Good faith in the sense of *bona fides* in Roman law is a term quite frequently used in Dutch legal language of the last twenty or thirty years in order to establish numerous legal principles not to be found explicitly in Dutch law, which is founded on statute law exclusively. Nevertheless it is on this particular ground that the decisions have been most strongly attacked by their critics. Professor Star Busmann in his note already cited, and Professor Meyers (the most prominent Dutch lawyer of to-day) in his paper *Weekblad voor Privaatrecht*, Notariaat & Registratie, Nos. 2878, 2879 and 2881, both distinguished writers, point out that the court's argument in this respect is mere camouflage and is an unhappy solution of a perfectly plain question. In their opinion the same decision ought to have been arrived at on the ground that (as Professor Meyers quotes with approval from the English case *Castrique* v. *Imrie*, (1870) L.R. 4 H.L. 414): "Our court will not act as a court of appeal from a foreign court even though the case was decided on a mistaken view of English law," and (as Professor Star Busmann puts it otherwise) because *Res judicata pro veritate habetur*, a rule founded in his opinion on the legal maxim *Lites finiri oportet*, *i.e.* that the quality of *res judicata* should be frankly attributed to a foreign judgment obtained at the instance of the very party subsequently trying to evade its consequences.

The reason why such fundamental principles of justice not found *expressis verbis* in our statutes are only hesitatingly applied by our Courts of Appeal is again to be found in the particularly restricted conception taken by the Supreme Court of its own judicial task as pointed out above. Owing to a desire not to depart from the written law, the Courts of

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[1] *Infra*.

[2] In Dutch terminology the word *billijkheid* is used, which means "equity" (French : *équité*) ; the use of this word in the present paper is avoided, however, in view of its wider meaning in English which is unknown on the Continent.

Appeal continue to be rather reluctant to confess openly their adherence to such principles of unwritten law, preferring to look for some more or less solid support in the statutes.

The case under consideration, however, did not end there. The plaintiffs now brought a new action against the same defendants under s. 1395 of the Civil Code, an action based on quasi-contract and very similar to the English action for money had and received. The action, which is usually termed *condictio indebiti* after its ancestor in Roman law, is directed against unjustified enrichment not only through undue payment of money proper, but also through every other delivery or performance done without consideration, etc. Its chief difference from the English action is that it also lies in case of payment, delivery, etc., on an illegal agreement—except in cases of gaming and wagering debts and contracts, while, as in England, payment on moral obligations is equally excepted from recovery.

In the case under discussion the plaintiffs claimed from the defendants redelivery of the fur coat they had delivered on the deceased gentleman's instruction and promise to pay for it, as it had now been established that the contract under which the delivery had been made was void and unenforceable, and in the alternative they claimed damages for want of redelivery of the said coat.

The plaintiffs, this time, were successful though their claim was met with two main arguments of no small importance. Firstly, it was pleaded, that again the English judgments barred the action now it had been decided that the original agreement had an illegal consideration in English law, in consequence whereof the new action would have to be decided according to English law and accordingly to be dismissed; secondly, it was contended that the defendants could rely on s. 1399, subs. 2 of the Dutch Civil Code, which runs as follows:

> 1399 (1) In the event of anybody after acquiring in good faith a thing not due to him having sold the same, his rendering the (selling) price shall be sufficient (to satisfy the *condictio indebiti*).
>
> (2) In the event of his having in good faith disposed of the same gratuitously (*i.e.* by way of donation) he shall not be bound to render anything.

It was pleaded that the deceased gentleman could have claimed the protection of this provision and that therefore the action against his executors failed.

The first plea was rejected by the District Court and by the Court of Appeal on the ground that, though the English judgments as to the question of validity of the agreement were binding upon the plaintiffs by reason of their own conduct, nevertheless Dutch law remained applicable on an event (viz. the alleged "undue payment") caused by the entering into in Holland of an agreement between a Dutch firm as sellers and an Englishman as buyer, the performance whereof had to take place in Holland.

On appealing to the Supreme Court on this point of law the defendants were defeated by the restricted conception of the court's task already referred to : as no section of any statute could be indicated which in the present case prescribed the application of foreign law, the Supreme Court refused to interfere with the decision of the Court of Appeal.

As to the second plea the Court of Appeal held that the court below was right in deciding that a person acquiring a thing on an immoral consideration and disposing of the same is acting in bad faith ; moreover, the appellate court added, the defendants could not rely on the deceased gentleman's ignorance of the immorality of the consideration, as they had themselves repudiated their liability on that ground and the action in the English courts had been dismissed on that very ground alleged by them.

On further appeal, the Supreme Court at some length affirmed this reasoning. In its elaborate considered judgment [1] it was argued that it followed from the findings of the Court of Appeal that the deceased gentleman had known the immorality of the agreement, thus knowing that the plaintiffs in performing the same gave something they could not lawfully be compelled to give, the result being that the deceased could not be said to have acted in good faith.

It was on this point that the ruling of the Supreme Court was again severely attacked by Professor Meyers in an annotation to the judgment.[2] He points out that, though the decision arrived at is right in point of law in his opinion, the facts have been badly tampered with. According to his view the rule ought to have been founded on the generally adopted French doctrine, also followed by the French Cour de Cassation,[3] which has thus been formulated by Demogué [4] : "La violation d'une loi d'ordre public implique, en effet, mauvaise foi, ou du moins doit être traitée comme telle." [5] The learned writer considers the court's reasoning to depart too far from reality. "This English officer," he continues, "had from the outset a more intimate knowledge of the law than many lawyers after having followed this case during a number of years ; nay, even now it is not yet certain whether English or Dutch law is applicable to the agreement and whether in Dutch law the agreement is to be deemed to have an immoral consideration."

Professor Star Busmann, in his annotation of the judgment,[6] also disapproves of the way the decision was arrived at and puts his opinion thus in a nutshell : "The executors' plea of 'good faith' on the side of their testator was inconsistent with their proper defence" (= "processual conduct," as the Dutch text runs literally).

The remark made above in respect of the earlier judgments equally applies here: again the courts preferred some doubtful and artificial reasoning based on a statutory provision to a perfectly sound solution to be found by the application of unwritten principles of law.

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[1] Cited above under No. 4.

[2] *Nederlandsche Jurisprudentie*, 1928, p. 315.

[3] Cass., November 5, 1856 ; Dalloz, 1856, 1, 397 ; January 31, 1853 ; *Dalloz*, 1853, 1, 217.

[4] *Traité des Obligations*, vol. iii, p. 194.

[5] "The violation of a law concerning public policy implies bad faith or at least should be treated as such."

[6] *Weekblad van het Recht*, No. 11784.

**Saakes' Case.**—This case, which may be regarded as an immediate sequel to the one discussed before, gave rise to a number of decisions, only two of which have been hitherto reported.[1] Here a jeweller's firm of The Hague sued the same defendants as in Kuhne's case for goods sold and delivered under exactly the same circumstances. Before the case came for trial, however, before the High Court of Justice in London, the plaintiffs became aware of Kuhne's action having been dismissed on the ground of immoral consideration, whereupon they (very wisely) decided to withdraw their case. Owing to their apparently insufficient knowledge of English legal language they did not instruct their solicitors to discontinue the action, but wrote them a letter which led their advisers to the belief that they were asked to retire. The result was that, when their case came for trial, Mr. Justice Salter, without a hearing, gave judgment for the defendants with costs, the plaintiffs not appearing.

The Dutch phase of the case began when the executors sued the former plaintiffs for payment of the costs taxed pursuant to the order of Mr. Justice Salter. Their opponents, now defendants, denied their liability on the ground that the English judgment was not binding upon them and, in the alternative, that the costs taxed were excessive according to Dutch views; moreover they counterclaimed the amount they had already sued for in London. This counterclaim gave rise to some interesting points. It was argued on behalf of the plaintiffs (the executors) that the counterclaim was barred by the English judgment dismissing the same action, and further, that the agreement sued upon was void by reason of its immoral consideration; the plaintiffs also put in a defence as to the facts which does not concern us now.

In its first judgment the District Court of The Hague[2] held that the action must succeed, as the defendants by suing in the English High Court had voluntarily incurred liability for costs; and as the costs had been taxed by the proper officer of that High Court in accordance with its rules and practice, there could be no question of their amount being excessive.

As to the counterclaim the court in this instance only considered the first plea, and decided that expert opinion should be submitted in order to enlighten the court on the exact nature of the conclusiveness of Mr. Justice Salter's judgment according to English law. On appeal, the judgment was upheld by the Court of Appeal of The Hague,[3] though it was slightly varied as to the method by which expert opinion should be obtained.

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[1] I am again indebted to Messrs. Bakker & Van Kuyk, thanks to whose kindness I have been able to take cognizance of all relevant documents concerning this case.

[2] April 13, 1926.

[3] February 24, 1927; *Nederlandsche Jurisprudentie*, 1928, p. 1443; *Weekblad van het Recht*, No. 11825.

The parties to the suit now submitted to the court written opinions from Mr. St. John Field and Mr. W. Roosegaarde Bisschop, barristers-at-law, of London.

Mr. Bisschop, in his elaborate opinion, firstly describes the practice of the English courts in the case of either of the parties not appearing at the proceedings, before the Master or at the trial. He sets out that, in his view, the order should not have been " judgment for the defendants," but : " the plaintiffs' claim dismissed," whereupon he explains with many precedents how the courts exercise their discretion in granting leave to apply for setting aside such judgment or order under R.S.C., O. 64, r. 7, though the time for making such application [1] may have expired. He then asserts that the English courts in the present case would have granted such leave and that therefore the judgment entered could not be deemed to bar the action before the Dutch courts. Incidentally he remarks, citing *Harris* v. *Quine*, (1869) L.R. 4 Q.B. 653, that it is a rule of English law that no foreign judgment will be available as a defence before an English court unless (*inter alia*) it is pronounced on the merits of the case. This rule, if applied to the present case, would equally defeat the plea referred to.

Mr. St. John Field, in a comparatively short opinion, takes a different view. He points out that only in very exceptional circumstances (which in effect are limited to cases of fraud, surprise or mistake) would the court set aside a judgment of the nature referred to. In view of the circumstances in which the then plaintiffs tried to withdraw their case and in view of the judgments in Kuhne's case, while the judgment had stood for approximately six and a half years and no application had been made to set it aside, he thinks it inconceivable that in such circumstances the English court would ever set aside the judgment.

Before discussing the judgments of the Dutch courts which followed, I think I should add that, as to the last point, Mr. St. John Field is undoubtedly right and Mr. Bisschop, in asserting the contrary, must have been mistaken. As a foreigner who never practised in England I am in no way entitled or qualified to express any definite opinion as to the question at issue, but in view of the practice of the courts as I know it from newspaper and official reports, I am inclined to believe that an application for leave under O. 64, r. 7 in the present case would not have the slightest chance of being granted and that, anyway, the judgment under discussion would never be set aside.

Now the way in which the case was further decided is remarkable. The District Court of The Hague [2] firstly held that the counterclaim was not barred by the English judgment on the following grounds : (1) it appeared from the experts' opinions that the judgment of Mr. Justice Salter was not irrevocably binding upon the parties, as the court inferred from the opinions that it was legally possible to have it set aside ; (2) the case had not been heard on its merits ; (3) the then plaintiffs had deliberately avoided such hearing, the result being that they were at liberty to bring the same action in the Dutch court to have it heard on the merits, subject always to their liability to pay the costs taxed pursuant to the said judgment.

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[1] O. 36, r. 33.

[2] January 31, 1928 ; *Nederlandsche Jurisprudentie*, 1929, p. 299 ; *Weekblad van het Recht*, No. 11898.

As to the second plea (immoral consideration) the court considered that a distinction must be drawn between " consideration " in its technical legal sense according to Dutch law (where it is termed *oorzaak, i.e.* cause) and the " motives " inducing a party to enter an agreement. " Consideration " in Dutch law is the scope of the agreement, in the present case the buyer's desire to acquire the goods and the seller's desire to receive the price. Therefore the court held that, however immoral the buyer's motives in concluding the sale might have been, the consideration was valid.

A further hearing and examination of witnesses was ordered on issues of fact.

On appeal this judgment too was affirmed. The judgment of the Court of Appeal of The Hague,[1] as far as the first plea is concerned, may be summarized as follows :

(1) Foreign judgments do not constitute *res judicata* ; each case has to be treated according to circumstances.

(2) It appears from Mr. Bisschop's opinion that in a case like the present, on the plaintiff not appearing at the trial, the judge does not " take cognizance " of the case, does not even ask what it is about, and simply orders the case to be struck off the paper.

(3) It appears from Mr. Justice Salter's judgment that the case has not been heard on its merits.

(4) The question to be decided is *not* whether a fresh action could be brought in—or whether the judgment is binding upon—the English courts, but whether such action can be brought in the Dutch courts.

(5) As the case was not heard on its merits, this action is not contrary to " good faith and reasonableness."

As to the second plea the Court of Appeal held that the appellants' contention (viz. that the agreement on which the counterclaim was founded lacked a legal consideration) was " wholly unfounded," and that the court of first instance was right in holding the agreement to be enforceable.

The case did not go to the Supreme Court and, owing to the peculiarities these issues present, is not likely ever to go there so far as the points of law under discussion are concerned. It seems therefore suitable to add some comment to the rulings in this case.

Firstly, it should be borne in mind that the courts clearly distinguished the facts in this case from those in Kuhne's case, though no express mention of the latter is made, according to Dutch practice, which does not officially recognize binding precedents and therefore rarely mentions them expressly, though of course the rulings of the Supreme Court are nearly always followed. In Kuhne's case it was held that after an action has been tried in a foreign court and has been dismissed by that court, the unsuccessful plaintiff is prevented from bringing the same action in the Dutch courts, as such procedure would be " contrary to good faith and reasonableness " ; in Saakes' case it was further held that this principle did not apply in the event of the action not having been heard on its merits.

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[1] December 13, 1928, not reported.

On the other hand, a slight divergence may be observed. In Kuhne's case, the Court of Appeal, on the plaintiffs' contention that the English courts' ruling as to the immorality of the agreement was inconsistent with Dutch public policy, decided after reviewing the facts that " the contrary rather occurred." In Saakes' case the plea founded on the same immorality was held to be " wholly unfounded." Of course, these two rulings do not contradict each other. It is, indeed, a different question whether a foreign judgment in applying its native law and thus taking a different view of the case is contrary to Dutch public policy, or whether that view can also be taken by the Dutch courts themselves.

A further observation to be made concerns the relatively great importance attached by the courts to the theoretical possibility of the English judgment being set aside. Instead of " theoretical " I think I might have said " hypothetical," as this possibility, on the grounds set out above, may be fairly held to be non-existent. It is true that, as Mr. Bisschop observed, the order should have been " the plaintiffs' claim dismissed," and not " judgment for the defendant." Apparently this statement is based on the ruling in *Armour* v. *Bate*,[1] but it follows from the judgment of Lord Esher M.R. in that case that a motion to set aside the judgment entered in the present case on that ground alone would fail. In that case judgment for the defendants was entered on the plaintiff not appearing, and on appeal by the plaintiff Lord Esher M.R., after stating that judgment ought to have been drawn up stating that the action was dismissed for want of appearance of the plaintiff at the trial, further held that the effect of such judgment would nevertheless be the same as if the action had been dismissed on the merits. " It appears, therefore, that the plaintiff has practically failed in this application, the difference between the judgment drawn up and that which we shall direct being a matter of form as far as he is concerned. The appeal must therefore be dismissed with costs, but the judgment will be amended by being drawn up in a form corresponding with the words of the rule " (*i.e.* O. 36, r. 32).

It is important to note the fact [2] that the defendants never tried to have the English judgment set aside, and in fact openly admitted that they never intended to do so. It seems therefore that the point was wrongly decided, as the defendants' own conduct of the case showed that they had not the slightest intention of ever trying to get the English judgment set aside, while they denied that they were bound by it on the ground of its being possibly set aside! The contradiction in this submission is apparent.

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[1] [1891] 2 Q.B. 233 C.A.

[2] I am not sure whether it was relied on in the Dutch courts.

Moreover, the then plaintiffs' conduct amounted to trying to discontinue their case, which they could not have done without leave under R.S.C., O. 26, r. 1 (the pleadings having been closed and the case having been put on the paper for trial [1]) or with consent under O. 26, r. 2. From the circumstances of the case it is obvious that such leave would not have been granted nor the consent have been given without an express condition that no other action would be brought on the same facts. These considerations ought to have led to a different decision, which besides would have been correct according to Dutch practice, where discontinuance with leave is unknown; it is either possible without consent before receipt of defence, or with consent after such receipt, thereafter discontinuance without consent becoming absolutely impossible.

With the greatest respect, I think the Dutch Court of Appeal must have erred on this point because it failed to take notice of these facts:

(1) That the then plaintiffs discontinued their case in the English court in an improper way;

(2) That they deliberately allowed the time for applying to set aside the judgment entered against them by reason of their irregular conduct to expire, that leave for such application at a later time undoubtedly would have been refused, or on its being granted the judgment nevertheless would have been affirmed on the grounds on which the action in Kuhne's case had been dismissed, and lastly that for those very reasons the then plaintiffs did never intend to make such application;

(3) That, therefore, the English judgment must be regarded as final and conclusive, and binding upon the then plaintiffs as *res judicata*.

As to the last point one final remark should be added. Mention has already been made of a passage in Mr. Bisschop's opinion stating that it follows from *Harris* v. *Quine* [2] that the English courts will not act upon a foreign judgment which has not been pronounced on the merits of the case. I doubt, however, whether this statement is wholly correct, though it is also to be found in Dicey's *Conflict of Laws*.[3] In *Harris* v. *Quine* it was held that a Manx judgment dismissing an action on the ground of a Manx statute of limitations did not prevent the plaintiff from bringing the same action in the English courts, as the period of limitation according to English law had not yet expired and the case had not been heard on the merits. This ruling, however, seems to apply only to matters of procedure and such is the meaning attached to it by several writers on the subject. In Foote's *Private International Jurisprudence*,[4]

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[1] *Robertson* v. *Purdey*, [1906] 2 Ch. 615. From the documents relating to the case under discussion one even gathers the impression that at the time of the then plaintiffs wishing to discontinue, the case had already been formally entered for trial!

[2] (1869) L.R. 4 Q.B. 653.

[3] 4th ed. (1927) at p. 460.

[4] 4th ed. (1914) at pp. 484 and 485.

*Harris* v. *Quine* is cited exclusively for the purpose of illustrating the rule: "that a foreign judgment declaring that a claim is barred by a local statute of limitations is no bar to an action in the tribunals of another State the laws of which fix a longer term of limitation of suit on the original cause of action." Westlake's *Private International Law*[1] also cites the case with reference only to the question of limitations. Spencer Bower on *Res Judicata* (1924) expressly adds in mentioning *Harris* v. *Quine*: "where the plea of estoppel by decision of Manx Court failed, but only because the issue was not the same."

On the other hand, the case of *Jeannot* v. *Fuerst*[2] shows that the English courts will act upon a foreign judgment as final and conclusive, though the circumstances of the case show that there had not been a hearing on the merits in the English sense, provided that there was nothing in the proceedings that was contrary to natural justice and there was in France a final judgment binding on the defendants by reason of their allowing the time for "opposing" (*i.e.* applying to set aside) the judgment to expire. The point of English law has been discussed at this length as it seems to follow from the wording of the Dutch Court of Appeal's judgment that it was also led to its decision by these considerations, which in my opinion are not sound.

The conclusion is, therefore, that the ruling in this case was wrong in Dutch law because of the erroneous view taken of English law. An explanation, moreover, of the readiness with which the Court of Appeal disregarded the English judgment as not final and conclusive while expressly mentioning the fact that the then plaintiffs deliberately caused it to be entered against them, may be found in the obvious and outspoken opinion of the court, that contrary to English and according to Dutch views the agreement sued upon was valid and enforceable. In Kuhne's case it was impossible (at least in its first phases in the Dutch courts !) to evade the consequences of the English judgments ; in the present case a means of evasion was found, though it may have been by reason of the court not having a quite clear conception of what exactly happened in the English case.

On the whole it can be said safely that the Dutch courts are in no way less inclined to accept by way of international comity the judgments of their foreign (English or other) colleagues as binding upon the litigants resorting to their judicial powers than the courts of other countries are. On the contrary, the first phases of Kuhne's case, like many other cases on record, clearly show that the Dutch courts accept such foreign judgments if properly procured even in cases where they do not themselves agree with the views expressed therein. This is one of the ways by which international justice may be promoted, and in collaborating therein neither the international jurisconsults nor the national courts of this country have ever failed to show the same zeal as those of other nations.

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[1] 7th ed. (1925) at p. 330.

[2] (1909) 25 T.L.R. 424.

# GULAK'S HISTORY OF THE JEWISH LAW OF PROPERTY.[1]

[*Contributed by* GEORGE J. WEBBER, ESQ., LL.B., *Barrister-at-Law, Lecturer in Law at the University of Manchester.*[2]]

**Introductory.**—Dr. A. Gulak, formerly an advocate of Odessa, and since 1925 Lecturer in Jewish Law at the Hebrew University of Jerusalem, has during the last ten years produced two standard works of Jewish legal research. For an authoritative exposition of the whole of Jewish law, one will always refer to the mediæval codes of *Maimonides* and of *Joseph Caro*. But for a terse restatement, illustrated by Greek and Roman parallels, the student will increasingly turn to Gulak's *Institutes* (1923).[3] Then, in 1926, came the *Oṣar Hashetarot.*[4] This *Treasury of Mediæval Jewish Deeds* is a veritable expression of law in daily life. These documents of domestic affairs—marriage, divorce, guardianship, inheritance—these instruments of the business community—of sale and gift, mortgage and partnership—these precedents of claims, and orders of the court portray in the quaint variety and tautology of their terms a lively picture of Jewish life in the Middle Ages. Moreover, the *Oṣar* is a standard source book of Jewish conveyances and precedents.

In his Inaugural Lecture at Cambridge in 1888, Maitland, speaking of English law, asked: "And now why is our history unwritten?"[5] It was not until forty years later that the nine volumes of Holdsworth's *History* were completed. For somewhat similar reasons the history of Jewish law is still unwritten. Hitherto the devotees of that system were mainly Rabbinical judges whose primary function was to administer the law. In Palestine to-day there is also a group of advocates who practise before the Rabbinical courts. But the practitioner usually cares little for the science of the law, and for its history he cares nothing. Jewish law is no exception. Moreover, there is an additional difficulty, for a technique of Jewish legal interpretation is yet to be completely evolved. The craft is still a mystery and the initiates are few.

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[1] *Leḥeker tōledōt hamishat haivri bittekufat hatalmud. Mēēt Asher Gulak. Hēlek Rishon: dīnē karkaot.* Junovitch: Jerusalem, 1929. (*Sifriah Mishpatit No. 7.*) Pp. xvi, 145, 6*s*. (Prolegomena to the study of the History of Jewish Law in the Talmudic Age. By Asher Gulak. Part I: The Law of Immoveable Property.)

[2] Paper read before the Society for Jewish Jurisprudence, in the Inner Temple, on March 19, 1931.

[3] *Yesōdē Hamishpat Haivri.* Berlin, 4 vols. See *International and Interreligious Private Law in Palestine*, by Frederic M. Goadby, M.A., B.C.L., ("Hamadpis" Press, Jerusalem, 1926,) pp. 135, 136.

[4] Junovitch's Legal Library, No. 5, pp. xlviii, 362. Jerusalem, 15*s*.

[5] *Why the History of English Law is not Written*, at pp. 480, 487 and ff. *The Collected Papers of Frederick William Maitland*, vol. i. (Cambridge: At the University Press, 1911.)

With arduous courage Dr. Gulak has begun to lay the foundations. The present work is based on a course of lectures delivered in the winter of 1927–8 at the Institute of Jewish Studies, Jerusalem. The book of itself is not ambitious, and the title of this paper (in the interests of brevity) is, in three respects, a misnomer. For, strictly, this book is neither a history nor the complete account of a particular subject, nor an exposition of the law of property. A chronological narrative it is not ; it does not deal with Biblical, mediæval or modern Jewish law, or with the law of moveables. It is really a series of historical monographs on certain topics of the law of immoveable property (*Karkaot*) in the Talmudic Age. That is all it purports to be—*prolegomena.* The author has taken a few of the topics which have particularly interested him—*e.g.* sale of land, limitation, agricultural holdings—has traced their history and attempted to show the unity of development. But the erudition, the historical grasp and the comparative treatment are all of a high order. This book is the first volume of a series—in the valuable Legal Library published by Dr. Junovitch—called *Prolegomena to the History of Jewish Law in the Talmudic Age.* Dr. Gulak recognizes that Talmudic law must first be investigated by itself before the history of Jewish law as a whole can ever be written. Secondly, he sees that even before the development of Talmudic law can be authoritatively expounded the foundations must be laid in a series of *prolegomena.* Upon this foundation none will be more competent than he to raise the superstructure.

**The Historical Periods.**—He explains, in the *Introduction*, that the Talmudic period is not homogeneous. It falls, as is well known, into two broad divisions : the period of the *Mishnah* (third century A.D.) and the period of the *Gemarah* (sixth century A.D.).[1] But even the Mishnaic Age can be divided into at least three parts, each differing fundamentally from the others, politically, economically and socially. This age began while a Jewish State still existed. After the destruction of the State in A.D. 70, there followed sixty years of limited autonomy. The abortive rebellion of Bar Cochba in A.D. 135 and the Hadrianic persecution dealt the final blow to all hopes of independence. Again, the end of the Mishnaic merges into the beginning of the Gemaraic period (sixth century A.D.). Finally there were two compilations of *Gemara*, one in Palestine and one in Babylon, and conditions in the two countries differed. The Mishnah—the Jewish Common Law—had been carried into Babylon, which, after three centuries, was to produce a code more embracing and more discriminating than the contemporary code of the Motherland.

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[1] See " The Principles of the Jewish Law of Property," by George J. Webber, *Journal of Comparative Legislation*, Third Series, vol. x, pt. i, pp. 82, 83 ; see also *Introduction to the Talmud*, by M. Mielziner, 3rd ed., New York, 1925, pp. 22–62.

**Political and Economic Conditions of Palestine.**—1. *Judæa.*—To understand the laws of land in the Mishnaic period, it is vital to know something of the conditions in Palestine under the Romans. The most profound and documented accounts are those of Dr. A. Büchler (the learned Principal of Jews' College).[1] To these Dr. Gulak makes frequent reference. The wars of A.D. 70 impoverished agriculture and the whole country and occasioned much new property law. A million Jews had perished in Jerusalem and 40,000 went over to the Romans during the siege. As a reward, the latter received their property back from Titus and Vespasian. Judæa became an imperial province and many leased land from the Emperor and began to farm again. The population began to recover, for in A.D. 135 one hundred thousand Jews rose in Judæa against Rome.[2] Taxes had increased and pressed heavily upon the people.[3] Land in the south was more productive than land in the north.[4] But "Judæa was infested with raiding bands."[5] There were Roman courts in the "administrative military centres."[6] But the Jewish courts had jurisdiction in civil affairs.[7]

2. *Galilee.*—In Galilee, too, economic conditions were very grave. The Jews continued in the second and third centuries to have autonomous courts.[8] There were official Jewish judges recognized by the Roman government. They were nobles, political leaders and members of the *Boule* of the town.[9] Their decisions, Dr. Büchler suggests, were not based on law but "on precedent and common sense."[10] Non-Jewish law was sometimes applied. "It is possible," he continues, "that the Roman government conceded to the Jews the application of their native civil law only on condition that they should apply non-Jewish law in case the parties desired to be judged by it."[10] But these official judges were not above bribery, and their courts were in an unsatisfactory state.[11]

**The Problems of the Historian of Jewish Law.**—Dr. Gulak proceeds to define three fundamental problems for the historian of Jewish law.

*Chronology.*—The first is historical: how can we fix the date of a given law? No systematic chronology exists, but there are several guiding principles. A rule is often stated in the name of a particular Rabbi. This may—or may not—help to fix the generation. Or again, an archaic form of expression may be in use, deriving from the date of origin. Lastly, by comparing the period of similar laws in other systems, one may hazard a confident guess at the date of the analogous Jewish law. Yet even if the name of a particular Rabbi is associated with the enunciation of a particular rule it by no means follows that he was the originator. He may merely have given the earliest recorded decision on a rule which had existed long before.

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[1] *The Economic Conditions of Judæa after the Destruction of the Second Temple*, London, 1912; Jews' College Publication, No. 4, p. 63. *The Political and the Social Leaders of the Jewish Community of Sepphoris in the Second and Third Centuries*, London (undated); Jews' College Publication, No. 1, pp. 92.

[2] Büchler, *Econ. Conditions*, pp. 29, 30, 40, 62, 63.

[3] *Ibid.*, pp. 43, 62, 63, 64.

[4] *Ibid.*, p. 47, citing *Baba Bathra*, p. 122a: "A se'ah of land in Judæa is worth five se'ahs in Galilee."

[5] *Ibid.*, p. 55, citing *Jebam*, xvi. 7.

[6] *Ibid.*, p. 59.

[7] *Ibid.*, p. 60, *n.* 1.

[8] *The Political and Social Leaders, etc., of Sefforis*, p. 3, and in particular, ch. ii, pp. 21–33; 68 *ibid.*, and pp. 21, 22, *n.* 2; 23, *n.* 2; 31.

[9] *Ibid.*, p. 8.

[10] *Ibid.*, p. 25, *n.* 1.

[11] *Ibid.*, pp. 25–8.

*Method of Development.*—By what method did the law develop? This is the second problem. How separate the original rule from the later accretion? The plain meaning of the *Mishnah* must primarily be examined, not its later reinterpretation. The safest plan is to treat legal phenomena as related to the political and economic life of their age. Sometimes, however, the reverse process is necessary. Dr. Gulak avows that he has gone first to the law of land because he desired to examine in practical conditions, as opposed to juristic theories, the basis of legal development. Agriculture was the main occupation of the Jewish people in the Talmudic Age.

*Foreign Influence.*—The third is the problem of foreign influence. Both in Palestine and in Babylon there were large numbers of foreign merchants, both itinerant and domiciled. We know how the Greek influx into Italy after the Punic Wars transformed by means of the *ius gentium* both the law and the polity of Rome. Two influences on Jewish law can be detected: Babylonian law on the one hand, and on the other the laws of Greece and Rome. It was not Roman law which exerted most influence but that form of law containing the greatest Greek admixture. Hence the Greek-Egyptian parallels are of the greatest value, as indicated in the ancient documents. Similarly the Syro-Roman law is often illuminating in explaining the Talmudic law because both systems take their rise out of similar economic conditions.

**Topics considered.**—These are: some general ordinances concerning land and agriculture; classification of *karkaot*; relics of the laws of redemption; sale of land; limitation; agricultural holdings; pledge.

**Some Agricultural Laws.**—After the war of A.D. 70 many landowners were killed or captured or abandoned their lands. Many emigrated; many were sold into captivity. Occupants were protected, at first not systematically. A distinction was drawn between captives and *émigrés*. After things became more settled, R. Simon b. Yochai[1] tried to discourage emigration. By a later rule, the owner, despite the occupant, might return to his land. In the time of Vespasian the land was confiscated, but the owners were allowed to remain on the land as tenants. Provincial land was not the subject of private property. *Vectigal* or land tax was payable to the *fiscus*. The Talmud contains various terms, with fine gradations of meaning, for those Romans and Jews who confiscate or possess themselves of confiscated property, to wit, murderers, confiscators, thieves (*annasim*), tax collectors (*meṣikim*).[1] Land could not, in law, be stolen. For ownership could only be acquired in one of the recognized modes.[2] But after the destruction the Rabbis had to recognize *de facto* occupiers. By a *sicaricon* law, a person who bought from the holder of confiscated property must give the original owner one-fourth, provided that the original owner was unable himself to repurchase the entire land. This excluded, however, tenant-farmers (*arisin*), who were not liable to the original owner.[3]

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[1] See *Jewish Encyclopædia*, vol. xi, pp. 359–63; *Mielziner, op. cit.*, pp 32, 33. R. Simon was a *Tanna* of the second century and was born in Galilee.

**Restraint on Alienation.**—Taxes after the Roman conquest were so heavy that many owners abandoned their lands. The practice of selling and letting lands to non-Jews became so prevalent that severe prohibitions were enacted to restrict the alienation of farms and houses.[4] The rule, however, was often broken. On the other hand, to buy from a non-Jew was permitted. The export of *Pérot* was forbidden—those essentials of food upon which society depended, *e.g.* wine, oil, flour.[5] Thus prices were kept from unduly rising and Dr. Gulak infers that a decline in agriculture had already set in. Nevertheless, even in the days of the *Amoraim* (third to sixth centuries), agriculture was still the most prevalent pursuit and land was more important than chattels.

**Relics of the Redemption of Land in the Jubilee.**—The prohibition of the sale of land to a non-Jew may have originated in the law of redemption of land which prevailed in Biblical times. Property was then owned by the tribe and to the tribe it returned in the Jubilee year. In the period of the Second Temple the Jubilee year had already fallen into disuse and the principle of private property became firmly established.[6] Despite this, the *Mishnah* contains relics of the Biblical rules. The owner of a house in a walled city was entitled, in Biblical times, to redeem it within one year. If it was then unredeemed, it became the absolute property of the buyer. It did not revert in the Jubilee.[1] In the time of the Second Temple this "equity of redemption" was not extended to other properties. Moreover, the term "walled city" was restricted to a city walled from the days of Joshua.[2] This date, Dr. Gulak points out, is not an arbitrary one, because it was in Joshua's time that the people first inherited according to tribes.[3] Then came a further restriction. The one year "equity of redemption" was abolished on the ground that it applied only when the Jubilee year was in existence.[4] Was this ordinance made in the age of the Destruction owing to the forced sale of lands and houses? Thus, Dr. Gulak.

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[1] Büchler, *Econ. Conditions*, pp. 31, 32, 43, 55; p. 62, *n.* 4: "During the revolution the sicarii of Massada attacked it (*Wars*, iv. 7, 2) in the night of Passover, scattered the population and drove it from the town, and women and children about 700 were killed." See also *Political and Social Conditions*, etc., pp. 43–6.

[2] See *Principles of Jewish Law of Property*, p. 85.

[3] Gulak, p. 15. Jastrow derives from καισαρίκιον. (*Dictionary*, p. 986.)

[4] Thus, land bought by the Jewish National Fund in Palestine to-day is "to be acquired as Jewish property and . . . the title to the land acquired is to be taken in the name of the Jewish National Fund, to the end that the same shall be held as the inalienable property of the Jewish people."—*Constitution of the Jewish Agency for Palestine*, 1929, Article 3 (*d*), cited by Sir John Hope Simpson, C.I.E., in *Report on Immigration, Land Settlement and Development*, 1930, p. 53 (Cmd. 3686). See also *Keren Kayeneth Le Jisroel, Limited* v. *Commissioners of Inland Revenue*, (1931) 47 T.L.R. 298, *per* Rowlatt J.

[5] Gulak, p. 20, citing *Baba Bathra*, p. 90b. The phrase used is *sheyēsh bahem ḥayē nĕfesh*.

[6] *Ibid.*, p. 35, citing *Arahin*, p. 32b. The legal basis for the abolition of the Jubilee was sought, and found in the enacting words, "and ye shall proclaim a release *to all its inhabitants*" (Lev. xxv. 10). This was interpreted to refer to a state of affairs when "all the inhabitants" were in Palestine, and to exclude the period both when some were in exile and when the identity of the tribes was lost.

Although private ownership was recognized in the time of the Second Temple, the sale of family lands to strangers was not viewed with favour. A ceremony called "*keẓaẓah*" ("severing family connexions") arose. "When a man sold his paternal estate, his relatives brought casks filled with parched ears and nuts and broke them in the presence of children: the latter picked them up, and they said, this man has been cut off, etc.; and when he brought it back, they did the same and called out, this man has returned to his heirloom."[5] The same ceremony was performed when a man married below his social rank. There was no legal value in the ceremony: it was merely a declaration of social ostracism.[6]

**Sale of Land.**—The largest and most interesting chapter—it occupies one-third of the book—deals with the sale of land. Was there a land registry in Palestine? If so, was it Jewish or Roman? Alternatively, did there exist both Jewish and Roman registries? When did the institution arise, and how long did it last?

**Archi or Land Registry.**—There are several references in *Mishnah* and *Toseftah* to an *Archi*. Jastrow derives the word from ἀρχή, ἀρχεῖον, and translates as "the recorder's office for pedigrees, deeds of sale, etc."[7] The references, too, he thinks, are to "the office of Gentiles (Romans)." At the time of the Jewish State there was an *archi* in Jerusalem, under the control of the *boule*. For at the beginning of the war of A.D. 70 Josephus is cited to show that rebels sought to fire τὰ ἀρχεῖα for the purpose of destroying records of debts. The officials fled and the building was fired.[8] Kraus thought this was Roman, but Gulak says that the Arche at Sefforis (the leading town in Galilee) was Jewish, for the pedigree of priesthood was kept there. Hence Gulak infers that the *arche* at Jerusalem was also Jewish. The land registry, however, through irregularities, fell into disfavour: hence it became the target of the populace in the war.[1] Dr. Büchler, however, points out that "it was the law that no property could change hands without registration at the competent Roman office as several passages in the Talmud and Midrash clearly state,"[2] and he mentions in particular R. Akiba's references to deeds made at non-Jewish offices.[3] This, of course, is not inconsistent with the possibility of a Jewish registry.

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[1] Lev. xxv. 29, 30. It was otherwise with houses in unwalled villages. They were regarded as fields and were redeemable in the Jubilee (v. 31).

[2] Gulak, p. 36.

[3] *Ibid.*, p. 37.

[4] *Ibid.*, p. 38, citing *Araḥin*, p. 39a. See Lev. xxv. 30: "It shall not go out in the jubilee."

[5] Jastrow, pp. 1407, 8, citing and translating *Y. Kidd*, i, p. 60c. Gulak, p. 41, citing *Y. Ketubot*, ch. ii, p. 10.

[6] Gulak, p. 42.

[7] *Ibid.*, p. 1119.

[8] *Ibid.*, p. 44, citing Josephus, *Wars*, ii. 17, 6.

The Jewish registries continued in some towns until the death of Akiba (A.D. 132).[4] Thereafter resort was made to the Roman registries. References are found to them in Talmudic literature. A Rabbinical rule was enacted that all deeds registered in non-Jewish registries, even though the witnesses were non-Jews, were valid in Jewish law, except bills of divorcement and emancipations.[5] We have no information as to whether the originals were kept or merely copies, and whether they were actually registered or not. No record was kept against each property, specifying what mortgages, etc., were outstanding.[6] Gulak cites the Syrian practices and thinks that the same rules must have prevailed in Palestine. After the Destruction the Rabbis approved of the "use of Roman registries."[7]

Jewish *shetars* were written in Hebrew or Aramaic[8] and the Roman government upheld their validity. The Hadrianic edicts (about A.D. 130) were directed against religious documents alone, *e.g.* Jewish *gittin* (bills of divorcement), *prusbul*,[9] not against commercial documents. The Rabbis, to get over the difficulty, applied the principle, "Equity regards as done that which ought to be done," and declared that a divorced wife might receive maintenance without the need for a *ketubah* (or marriage settlement),[10] and that a creditor might collect his debt even after the Sabbatical year, without a *prusbul*.[11] In spite, however, of this enactment, some Rabbis provided that Jewish deeds must be written in Hebrew (*i.e.* not in Greek), otherwise they would be regarded as having the validity of a gift alone! There was no excessive love for Roman registries.

Seeing that there was no compulsory registration in Rome, probably none existed in Palestine. It was necessary that the authorities should know, however, of changes of ownership, for the purpose of assessing the buyer with the land taxes. Mortgages were not published, and apparently, therefore, the bringing of a *shetar* to the *arche* gave it no additional legal validity or value.[1]

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[1] Gulak, pp. 46, 47.

[2] *Econ. Conditions*, pp. 40, 41 and *n*. 1.

[3] *Ibid.*, p. 60, citing *Gittin*, i, p. 11a; *Tos*, i, p. 4.

[4] Gulak cites Dr. Büchler's *Econ. Conditions*, p. 28, *n*. 2.

[5] Gulak, p. 54, citing *Gittin*, i, p. 5.

[6] Gulak, p. 55.

[7] *Ibid.*, p. 56.

[8] In Mishnaic times they were written in Aramaic, as being the language understood by the people. In mediæval times, when Aramaic was no longer used by the Jews, these Aramaic precedents were translated into Hebrew and Hebrew became the prevalent language of Jewish legal documents. See Gulak, *Oṣar Hashetaroth*, p. xxiii.

[9] Jastrow, p. 1218, "a declaration made in court, before the execution of a loan, to the effect that the law of limitation by the entrance of the Sabbatical year shall not apply to the loan to be transacted."

[10] See *Jewish Encyclopædia*, vol. vii, p. 475.

[11] Gulak, p. 57, citing *Ketubot*, ix. 9.

**Form of Shetar or Conveyance.**—Next, what was the form of a deed of conveyance? Jeremiah used what might be called an "indenture,"[2] a deed in two parts: *galui veḥasum*, the public and the private. In the time of the Mishnah there was the *shetar mekusshar*—the folded deed. (It became obsolete in Talmudic times.) This was folded up and sealed outside so that, without breaking the seals, it could not be opened. A copy was made for the owner, which he could use and read at any time (*galui*). If any litigation supervened, the *ḥasum* was opened in the presence of witnesses. Gulak compares the *shetar mekusshar* with *συγγραφή* and a similar institution in Ptolemaic Egypt, and in Rome. The deed was folded sevenfold. There were seven witnesses and seven seals. After A.D. 70 these *shetaroth* fell into disuse. There were no buildings wherein they could be kept. It was difficult in the event of a law suit many years after to procure the original witnesses. And even if they did attend, they might not recognize their seals.[3]

**Characteristics of Jewish Conveyances.**—In his *Oṣar Hashetaroth* Gulak delineates the general characteristics of Jewish deeds. From earliest times they were written in the first, not in the third, person, thus differing from the Babylonian deeds.[4] As in all legal documents, there is a wealth of unnecessary tautology.[5] Each deed contained two parts: first, what we should call "the operative words" containing the duties of *e.g.* the seller, and secondly, what we should call a very wide "covenant for further assurance," in which it was agreed that the claim of any person tracing title through the seller was to be void—as a "broken potsherd"[6]—both in Jewish and in non-Jewish law. There are Babylonian parallels, though there is no record of such a clause in Talmudic, as opposed to mediæval, Jewish deeds.[7]

Very often there were terms implied in later deeds.[8] But the rights of the parties were usually very fully specified. "Let the buyer be permitted to work and to plant; to uproot and to plough, and to sow; to evict a tenant and to introduce a tenant; to inherit and to give the land in inheritance or in gift to whomsoever he will, he and those tracing title through him. For in good faith I have sold unto him this parcel to be his henceforth without any reservation in the world either to me or to those who trace title through me."[9]

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[1] Gulak, p. 59.

[2] Jer. xxxii.

[3] Gulak, pp. 60–3.

[4] *Ibid.*, pp. xxxiii, xxxiv, citing *Baba Bathra*, p. 51: *sadi meḥurah lakh, sadi kenuyah lakh* ("My field is sold unto you, my field is vested in you"). See also *ibid.*, pp. 161, 162 for fragments of Talmudic conveyances, and pp. 162, 163 for a typical mediæval Jewish conveyance.

[5] *Ibid.*, pp. xxxii and xxxiv, citing *Baba Bathra*, p. 63: *mitehôm ar'a' ve'ad rūm rakia'* ("From the depth of the soil unto the height of the heaven," *sc.* is vested in you). See also pp. 162, 163.

[6] See, for example, *Shetar*, No. 174, from the precedents of R. Judah Albarceloni; *ibid.*, pp. 162, 163.

[7] *Ibid.*, pp. xxxvi and 32 *n.*

[8] *Ibid.*, pp. xxxviii and 2 *n.*

[9] *Ibid.*, p. 153.

**Jewish Conveyancers.**—The Jewish conveyancers were under the supervision of the court. The younger learned the craft from the elder men.[1] Probably there were books of precedents, but these, if they existed, have been lost.[2] The conveyancer did not seal the deed, but he could act as witness.[3] No formal validity attached to the formal wording, nor did a deed derive its force from being drawn up by a conveyancer but from the correct attestation.[4] The point was argued as to whether it was the sealing that must be attested, or the delivery. Gulak thinks that originally it was sufficient if witnesses proved the delivery and that the attestation of the deed itself was a later development.[5] He thinks this from a comparison of comparative institutions in Babylon, Greece, Egypt and Rome. Later, witnesses must affix not merely their seals, but also their names.

**Effect of a Conveyance.**—But a conveyance was by no means necessary or regular. We find texts which say: "This refers to a case where no deed of conveyance is delivered."[6] Yet a deed was valuable because, if the property were taken from the purchaser, he could claim land to an equal amount from the seller's charged property.

In early times the *shetar* did not pass the property unless the price was paid. In later times the property passed on the delivery of the *shetar*, unless there was a condition that the price should be paid.[7] No universal custom existed; the rule varied from place to place.[8]

**Modes of Acquisition.**—The third method of the acquisition of land—after payment of price and delivery of conveyance—was the exercise of certain acts of ownership, *Ḥasaka.*[9] Fitting up a fence, breaking one down, are examples given.[10] Efforts were made to make the mode of acquisition easier. If A sold ten fields in ten provinces, as soon as B acquired one he was deemed to have acquired all. It is uncertain whether *ḥasaka* ever became necessary if the price had been paid and the deed delivered.[11]

In the first generation of *Amoraim* (end of third century A.D.) the method of acquisition called *kinyan sudar*—a fictitious contract of barter—was already in regular use. By this mode A might pass the property in Blackacre to B by exchanging therefor a small object of nominal value. But whose object—the buyer's or the seller's? About this there was a dispute.[12] By this mode property in land could pass without payment of the price.[13]

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[1] *Oṣar Hashetarot*, Introduction, p. xxv.

[2] *Ibid.*, p. xxvi.

[3] Gulak, p. 60.

[4] *Ibid.*, p. 60, citing *en kiyyum hagget ela beḥosemot. Eduyot*, ii, p. 3; *Gittin*, ii. 8.

[5] Gulak, p. 61.

[6] *Ibid.*, p. 68, citing *Kiddushin* 26th; *Ketubot*, p. 89a.

[7] Gulak, p. 70.

[8] *Ibid.*, p. 77.

[9] "Claim based on undisturbed possession during a legally fixed period."—Jastrow, p. 445.

[10] Gulak, p. 77, citing *Baba Bathra*, p. 42a.

[11] Gulak, p. 81.

[12] *Ibid.*, p. 85.

[13] On modes of acquisition generally, see *The Principles of the Jewish Law of Property*, pp. 55–88.

**The Sale Impugned.**—What if the sale were impugned? The seller's creditors had the right—which was implied—of following the land sold into the purchaser's hands, if the seller had no other assets and if their claim were prior to the sale. The seller then had two duties: either to vindicate the sale or to pay compensation to the buyer for eviction. The latter was regarded in Jewish law as the more important obligation. The seller was not obliged to join in proceedings, but probably the purchaser was entitled to join him as a third party.[1]

**Periods of Limitation.**—With regard to the period of limitation there was a division of opinion among the Rabbis of the Mishnah. Rabbi Ishmael and Akiba[2] held that two conditions must be present: (*a*) the land must be used and its fruits eaten for three seasons; (*b*) if the land was regularly produce-bearing, a period of three years applied. In all other cases R. Ishmael placed the period at eighteen months, R. Akiba at fourteen months. No additional period ran if the limitation was not *inter præsentes*. On the other hand, Rabbi Judah took the view that the three years period only applied if the parties were not *præsentes*. This applied to all kinds of property. If the parties were *præsentes*, one year would be sufficient.[3] In Talmudic times Akiba's view prevailed, but without any distinction between the different kinds of property. Gulak thinks that R. Judah's view was the older and prevailed before the Destruction, but that later his view was not accepted.[4]

Now *Ḥezekat hashanim* was not acquisitive, but simply evidence of the holder's title. It was useful evidence if the witnesses to a deed were unavailable. For after three years the owner would no longer need a deed to prove his title. According to one text, a man who can rest his title on deed or long possession must prove it by deed. This was the view of R. Judah (the editor of the Mishnah). Rabban Simeon ben Gamliel said that the claimant could rest his title on long possession,[5] and this was so even if the deed were invalid. *Ḥasaka* of itself does not destroy the Jewish owner's title. *Usucapio*, on the other hand, was acquisitive. But although there are resemblances between *ḥasaka* and *longi temporis præscriptio*, Roman law did not influence Jewish law in this respect. For the latter institution did not arise until the second century, while *ḥasaka* existed in the first century.

*Ḥasaka* could be disturbed if the owner made a protest (*maḥaah*) in the presence of two persons (according to the Babylonian Talmud) or before the court (according to the Palestinian Talmud). But the rule later relaxed. This is one of the vital differences between the systems prevailing in Palestine and Jerusalem, respectively.[6]

**The Aris or Tenant Farmer.**—Of the two other subjects dealt with by Dr. Gulak—agricultural tenancy, and the law of pledge—the former is of particular interest. There were three kinds of tenancy in the Talmudic period. The tenant might pay either a fixed money rent per annum, or secondly a fixed rent in kind (*hachirah*), or thirdly, a rent of one-half, one-third or one-quarter of the outgoings. This was called *arisut*, and was the most frequent form in Mishnaic times.

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[1] Gulak, p. 90.

[2] See Mielziner, *op. cit.*, pp. 28, 29, 30. First half of second century A.D.

[3] Gulak, pp. 95, 96, citing *Baba Bathra*, iii. 1.

[4] Gulak, p. 97.

[5] *Ibid.*, p. 100, citing *Baba Bathra*, p. 169b. See Mielziner, *op. cit.*, pp. 35–8.

[6] Gulak, p. 106, citing Jerusalem, *Baba Bathra*, iii. 3.

*General Characteristics.*—The *Aris* might be a tenant for seven years or a lesser period. He usually provided the seed and the work.[1] If the *Aris* were very poor, the owner lent him seed and sometimes money. Sometimes the owner would provide him with implements to dig and sticks to fence the land. Often the *arisim* were hardly distinguishable from simple hired workers. In Mishnaic homes the *aris* retained one-third of the produce and gave the owners two-thirds. The owner paid the taxes on the land—often in the form of produce. At the end of the term the owner could make the *aris* take an oath that he had not concealed any produce. The *aris* entered into possession by means of *kinyan, e.g.* either by payment, deed or *ḥasaka.*[2] His possession was not divested by the owner selling or letting to another person. There was one exception, for if the owner were pressed for money, he could sell and divest the previous tenancy.[3]

*Subletting.*—Could the *aris* sublet ? A text suggests that if he did, the owner could say to the *aris* : I have no concern with any other person except you.[4] The implication is that the *aris* could sublet but that the owner is concerned with his own tenant only.[3] But might the *aris* sublet to another *aris* ? Here there is a difference between the Jerusalem and Babylonian texts. In Palestine the institution of a sub-tenant was recognized, but not in Babylon.[5] In Rome the tenant farmer might introduce another tenant farmer in his place. *Conductores* would farm lands among *coloni*. The same rule prevailed in the *Hammurabi* code. Gulak tries to reconcile the Babylonian (Talmudic) text with the general custom in other codes by saying that in Babylon the prohibition applied only when the estate of the *aris* was small. But if the estate were large, he might sublet.[6]

*Perpetual Tenancy.*—There is evidence too of a Jewish form of perpetual tenancy.[7] It applied to a case where the *aris* had to work the land for many years before he got a return for his outlay. Was this merely a tenancy for life or a heritable estate ? The *emphyteuta* differed from the *aris bate abot.*[8] But there is a Greek parallel in *μίσθωσις εἰς πατρικόν* and similarly, an Egyptian parallel. Hence Gulak suggests that the Jewish was derived from the Greek institution and took its rise at a time when the rich no longer worked the lands themselves through slaves, but let their lands on lease to a race of farmers. But the *aris bote abot* was not bound to the soil.[9] Their numbers increased after the destruction in A.D. 70; many probably were fallen gentlemen farmers.

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[1] Gulak, p. 110. [2] *Ibid.*, p. 115, citing *Baba Meziah*, ix. 3. [3] Gulak, p. 115.

[4] *Ibid.*, p. 117, citing *Baba Meziah*, ix. 12. [5] Gulak, pp. 117, 118.

[6] *Ibid.*, p. 119, citing C. iv. 656 : "nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit."

[7] *Ibid.*, p. 124. [8] *Ibid.*, p. 126. [9] *Ibid.*, p. 127.

*A Jewish Emphyteuta.*—A particular form of *aris* was called *shatla*, whose duty it was to work (*shatal*) the land. He appears to be a localized kind of *emphyteuta*,[1] and could be removed if he was not working the land satisfactorily.[2] Conversely, however, he was entitled to leave after four years and claim compensation for improved value. The improved value was divided equally between owner and *shatla*. But the owner must not lose in the taking of a new tenant, and, accordingly, in some localities he was entitled to deduct from the improved value paid to the old *shatla* the cost of hiring a new *shatla*. The *aris* was a freeman. But the *colonatus*, bound to the land,[3] was introduced into Palestine between A.D. 383 and 388. Gulak does not entirely accept Seeck's view that the historical origin was to facilitate the collection of land taxes, *capitatio humana atque animalium*. He sees its origin rather in the growth of *latifundia* and in the general decline of the Roman Empire.[4] The institution spread—though later than elsewhere—to Palestine, and with it began the decline in Jewish agriculture.[5]

**Conclusion.**—Dr. Gulak's *History* is one of the few significant books written on Jewish law in this generation. It is a work of tremendous erudition, critical and comparative. In particular, the references to the texts and authorities in Babylonian, Greek, Roman and Syrian law, stimulate, as they fascinate, the reader. The book is, moreover, amply documented from Jewish sources—Biblical, Misnaic, Talmudic and mediæval. The author sometimes luxuriates too fondly in footnotes. But in what is fundamentally a source book for further comparative monographs, this is a fault eminently on the right side.

Law is correlated with history: some chapters might easily have been written for an economic history. Perhaps Dr. Gulak overstresses somewhat this idea of law as a product of economic forces. Yet in the present state of Jewish legal science this is inevitable. Only when all the material is fully collated—one hopes he will be the Holdsworth of Jewish law—will proportionate emphasis be placed on all contributory factors.

The book suffers from one grave defect. There is no Index or Bibliography. Indices of subjects, of references to Jewish and non-Jewish texts, of authorities mediæval and modern, are vital to the researcher. And a bibliographical apparatus containing comparative authorities is indispensable. Perhaps Dr. Gulak will include this in the second volume.

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[1] Gulak, p. 131.

[2] *Ibid.*, p. 132. See Buckland's *Text-book of Roman Law*, Cambridge, 1921, p. 275.

[3] Gulak, p. 135, quoting Seeck.

[4] *Ibid.*, p. 136.

[5] *Ibid.*, p. 137.

# THE NEW GERMAN COMPANY LAW AND THE ENGLISH COMPANIES ACT, 1929—II.

[*Contributed by* Dr. Richard Rosendorff, *Rechtsanwalt, Berlin.*]

**Council of Supervision.**—The German emergency measures decisively changed the character of the council of supervision, a change which in the view of the legislature is of utmost importance. It is now provided that all rules of the statute regulating the composition and formation of the council of supervision and the re-numeration of its members shall fall into desuetude at the next general meeting, that all offices shall expire at the same time, that after the new election the number of members of a council of supervision shall not exceed thirty and that nobody who is a member of more than twenty companies shall be allowed to be elected. In these provisions the legislature expresses its distrust of the character of the council of supervision existing hitherto. This distrust was aroused because, according to the opinion of the legislature, numerous companies collapsed owing to the council of supervision failing to fulfil its duties effectively. In practice, however, these measures will scarcely bring about a considerable change. Among the 12,000 joint-stock companies existing in Germany there are only about a few dozen of them with a council of supervision consisting of more than thirty members. And among the 25,000 persons holding office in a council of supervision only a very few industrialists and a number of directors of large banks are members of more than twenty councils. Several large companies, as for example the *Deutsche Bank und Diskonto Gesellschaft* and the *Dresdner Bank* elected the former members of its council of supervision who lost office according to the new provisions to the local committee (*Lokalausschuss*), or as in some industrial companies a new "advisory council" (*Beratender Aufsichtsrat*) was introduced. Whether or not the new rules also apply to foreign companies is still a matter of controversy. There are cases where persons who are members of the Council of supervision of German companies hold office also in seven to thirteen foreign companies.

**General Meeting.**—As one objective of the reform movement of all countries we find the demand for an extension of the rights of the general meeting, especially since the practice shows a tendency to suppress the influence of the general meeting in favour of the power of the administration. Already the Draft of a new German Companies Act favoured an increase of the rights of the general meeting. This point of view is in agreement with the tendency, very cautious, however, underlying the reform of the English Companies Law. The interest is centred round the problems of the right of banks to vote on the shares which they keep in deposit, the plural vote shares and the right of the individual shareholder to ask for information. The regulation of the last two problems is contemplated by the Draft Act and will be treated in one of the following chapters. The situation concerning the right of the banks to vote the shares which they keep in deposit is as follows : A great number of shares are deposited at the banks. Since in practice the shareholders are too indolent to appear at the annual meeting or to send a representative with written authority as they are entitled to do according to s. 252 of the German Commercial Code their voting right is exercised by the German banks. The banks are entitled to this practice by inserting a clause in their business conditions, authorizing them to exercise the voting power at the annual meeting on behalf of their clients. By custom the banks transferred this voting right to the administration with which they were connected. The opponents of this practice consider it as a falsification of the will of the majority by which the small capital owner is excluded in favour of the big capital owner. Those, however, who are in favour of this system speak about the " fortunate indolence " of the shareholders who were wise enough to realize that they by buying a certain share do not acquire the capacity to judge and criticize now a banking enterprise, then a mine and also an electricity company. Therefore, they say, the shareholders are acting in their own well-understood interest if they leave their vote to the expert representation of the banks. The legislature adopts a point of view favourable to the right of the banks to vote on the shares which they keep in deposit. In all probability the right of vote would not be exercised by many individual shareholders, the representation of those by their bank is therefore, in comparison, to be preferred. An elimination of the right of the banks to vote on the shares which they keep in deposit would therefore result in endangering the interests of the individual small shareholder. The legislator, however, provided nevertheless in one section of the emergency measures of September 19, 1931, which is concerned with a supervision of banks, that the board of trustees should be empowered to lay down conditions under which the banks should be allowed to vote on the shares which they keep in deposit. This problem has played no part in the English reform movement.

**Extension of the Duties concerning Publicity.**—The present state of affairs concerning publicity is looked upon as wholly unsatisfactory, and complaints have become loud especially in recent years. During these last years there was a definite tendency to make the accounts more and more colourless and scanty. In English company law up to the time of the last reform there was no obligation put upon the directors to ensure the keeping of the necessary books. There was one exception only, as far as the banks were concerned. The company could freely decide whether or not it wanted such an obligatory clause to keep books inserted in its articles. The company had to present annually a balance sheet, examined and approved by auditors, as well as a business report. But there were no legal regulations according to which the annual balance sheet had to be presented to the general meeting. The articles of the company, however, contained in most cases an obligation to this effect. This legal situation brought about many abuses as is openly recognized by the Greene Commission. The Greene Report runs as follows :

> Under the present law there is no direct statutory obligation on a company to keep proper accounts. We consider that the law should be altered so as to make the keeping of such accounts compulsory. In the case of companies it is for obvious reasons impossible to specify with any elaboration the accounts to be kept, and our recommendation goes as far in this direction as we consider to be practicable. Experience shows that in many instances, particularly in the case of private companies, accounts are not properly kept, with the result that when liquidation ensues the company's books are found to be so defective and confused that it is impossible to find out what has become of goods and money belonging to it. There can be no doubt that default of this kind is often deliberate, and we consider that heavy penalties should be imposed with imprisonment when the default is wilful.

S. 122, Companies Act, 1929, makes, therefore, the keeping of books obligatory for all companies and regulates the content and form of the necessary books.

As to the obligation to keep accounts and to file them the Commission expressed the following judgment :

> With regard to the form of accounts, although in general we consider that shareholders and others concerned have little ground for complaint, cases occur where the information given by the accounts is of a scanty nature, particularly where assets are so grouped together under one heading that the true position of the company cannot readily be ascertained.
>
> We think it most undesirable to attempt to lay down hard-and-fast rules as to the form which a balance sheet should take, but we consider that the recommendations set out below will help to remove some of these grounds for complaint. The matter of accounts is one in which we are satisfied upon the evidence before us that within reasonable limits companies should be left a free hand.
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> With regard to the filing of published accounts, s. 26(3) has not worked well in practice. The form of statement required by that subsection is not satisfactory and it is permissible to file the same statement year after year. We consider that in lieu of the present statement the last audited balance sheet of the company should be filed. As the subsection only applies to public companies we are of opinion that there can be no objection to this course. One result of this recommendation, if adopted, will be to enable the registrar to tell, in cases where he cannot easily do so at present, whether a company is defunct or not. We have considered the question whether private companies should be compelled to file accounts and, in our opinion, the present exemption enjoyed by these companies should be continued.

The Commission studied especially thoroughly a question which was also in the centre of interest for the German reform movement: that of accounts of holding companies. The report states:

> The position of holding companies with particular reference to the form of their accounts has been much discussed before us, and the evidence discloses a considerable divergence of views on the subject among both commercial men and accountants. Complaints have undoubtedly been heard from shareholders in such companies that the information given to them by the accounts of the holding companies is unintelligible without fuller details as to the position of the subsidiary and associated companies. Some witnesses take the view that the publication of a consolidated or combined balance sheet for the whole group of companies should be made compulsory. We do not agree with this. Many holding companies have adopted the practice already, and we consider that the matter should be left to the shareholders to make such requirements as to the form of their company's accounts as they may think proper. It is often forgotten that it may be in the best interests of the shareholders themselves that the accounts should be in a certain form, and we consider that undue interference by the legislature in the internal affairs of companies is to be avoided, even if some risk of hardship in individual cases is involved.
>
> In view of the divergence of opinion upon this and cognate matters we only find ourselves able to make recommendations of a quite limited character. One of these requires a short explanation. In law there is nothing to prevent a holding company from using the dividend received from profit-making subsidiaries in order to pay a dividend on its own shares without taking into account losses suffered by other subsidiaries, and the effect of this may be that the holding company is paying a dividend at a time when the group as a whole is in debit on the year's working. Although this practice may in general be unsound, particularly if it is continued for any period, we do not think that any case has been made for prohibiting it altogether. On the other hand, we consider that shareholders and others concerned are entitled to know whether the dividends proposed to be declared by the holding company are justified by the results of the group as a whole.

The Companies Act, 1929, therefore provides for a considerable extension of the duty to disclose certain facts. The new provisions relative thereto are contained in ss. 108–111. The report must especially specify the following particulars: (*a*) The amount of the share capital of the company, and the number of the shares into which it is divided; (*b*) the number of shares taken from the commencement of the company up to the date of the return; (*c*) the amount called up on each share; (*d*) the total amount of calls received; (*e*) the total amounts of calls unpaid; (*f*) the total amounts of the sums, if any, paid by way of commission in respect of any shares or debentures; (*g*) particulars of the discount allowed on the issue of any shares issued at a discount, or of so much of that discount as has not been written off at the date on which the return is made; (*h*) the total amount of the sums, if any, allowed by way of discount in respect of any debentures, since the date of the last return;

(*i*) the total number of shares forfeited ; (*k*) the total amount of shares for which share warrants are outstanding at the date of the return ; (*l*) the total amount of share warrants issued and surrendered respectively since the date of the last return ; (*m*) the number of shares comprised in each share warrant ; (*n*) all such particulars with respect to the persons who at the date of the return are the directors of the company as are by this Act required to be contained with respect to directors in the register of the directors of a company ; (*o*) the total amount of the indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July, nineteen hundred and eight.

(*To be continued.*)

# NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

**The Nature of Inter-Imperial Relations.**—With the coming into operation of the Statute of Westminster there has been eliminated actually, or as regards these Dominions which have not yet adopted the statute potentially, the possibility of the regulation of inter-imperial relations by Act of the British Parliament. There now therefore arises the difficult problem of determining a code of principles upon which the relations of the several parts of the Empire are to be based. Are the relations, for example, of the Dominions to the United Kingdom and *inter se* to be subject to the rules of international law, or are they to be governed by some other principles, and if so what are these principles to be? The matter, of course, in the typical British manner will doubtless have to be worked out piecemeal by the adoption of solutions of cases arising in practice. It is the manner in which Dominion autonomy evolved, and practical politicians necessarily must concern themselves with immediate solutions of each controversial issue as it emerges.

**The Character of Inter-Imperial Contracts.**—No better example of the confusion of view can be adduced than the contentions on which stress is placed by the British and the Irish Free State Governments as regards the annuities payable in respect of Irish land. The British Government in general admittedly stands for the view that international law is not applicable between the various parts of the Commonwealth, but one of its chief contentions against the State rests on the view that the agreement for a financial settlement of 1926 did not require ratification from the standpoint of international law. The Free State again stresses in its contentions the constitutional doctrine that no government by its executive authority can pledge a country to pay moneys so as to create an obligation binding on that country. Any such compact is concluded on the basis of the essential constitutional understanding that the assent of Parliament is necessary for the homologation of the undertaking. It is further asserted by the State that the Land Act of 1923 did not constitute a Parliamentary approval of the financial agreement between the two countries of 1923, and it is insisted that the agreement of 1926 was never approved by Parliament at all. The British contention, of course, can be supported by international law precedents,[1] though there are arguments which lead to a contradictory result. But there is one fact which unquestionably weakens the value of the British contention regarded technically. Whether a pecuniary agreement is such as to require formal ratification must as between any two countries depend largely on the course of action between the two, and in the case of the United Kingdom and the Free State it must be admitted that the pecuniary settlements of 1921, 1925 and 1929 were all carried out by formal instruments which expressly demanded ratification as necessary to their validity. The agreement of 1923 was avowedly provisional and therefore was naturally not couched in treaty form, but that of 1926 was final, and it is certainly difficult to claim for it the same binding value as the treaty form and ratification gave to the other settlements. It is not, therefore, possible to dismiss as wholly untenable the claim that in its nature the agreement of 1926 was a mere governmental accord which cannot be insisted upon by one government against another, if the latter decides on national grounds that the settlement can no longer be deemed just.

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[1] See Wheaton, *International Law* (ed. Keith), i, 490–6.

**Parliament and the Executive.**—The Free State argument from constitutional practice is of special interest, because it rests on a principle which all the courts of the Empire have stressed, the inability of the executive to usurp the functions of Parliament and to bind a country to pay money. The principle clearly is absolutely sound; the control of the purse is the root of the power of Parliament and the necessity of securing appropriation from the House of Commons must not be weakened. The Privy Council has applied the doctrine so as to rule that payments made without Parliamentary sanction can be recovered from the payee;[1] the High Court of the Commonwealth has denied the right of the executive to bind the Commonwealth by contract irrespective of Parliamentary control,[2] and the Parliament of Canada has been held by the Supreme Court of the Dominion not to have the power to create a liability of a province, which can be enforced against it, by requiring that the aid of the militia in time of labour unrest shall be accorded only on a promise by the Attorney-General of the province that the local government shall recoup the cost.[3] The conclusion seems unavoidable that the effect of a governmental compact under the common law of the British Commonwealth is merely to impose an obligation to seek Parliamentary sanction for the compact, and that without such sanction the compact is ineffective.[4] There is an analogy in the agreements reached at Imperial Conferences, which are clearly subject to approval by Parliaments, and which do not bind governments other than those by which they are made.

**The Commonwealth and New South Wales.**—The issue of Parliamentary control of expenditure was the most effective argument which was adduced for the State in the controversy over the right of the Commonwealth Parliament to enact the Financial Agreements Enforcement Act of 1932.[1] It has always been doubted how far the Commonwealth legislative power extended to coerce the States to make payments. The issue arose obviously in the matter of industrial awards, once it had been decided by the High Court that the instrumentalities of the States were not exempt from control by the decisions of the Commonwealth Court of Conciliation and Arbitration. Could railway employees in the States compel the State governments to pay rates of wages, if the Parliaments failed to provide the necessary sums ? The best opinion clearly was that they could not. The award of the court was binding, but the obligation was one of imperfect character ; it placed a moral obligation on the Parliament and government concerned, but, if they had failed to act, the matter must rest there.[2] Was this analogy binding in the case of the agreement as to State debts ? The majority of the High Court, no doubt rightly, held that it was not.[3] The decision seems clearly sound. It rests on the obvious fact that an agreement as to debt payments would be worthless if in the last resort it could not be enforced by effective means, and this means was accorded by subsection 3 of the new section 105A added by constitutional change in 1928–9 to the federal constitution. By this subsection the Commonwealth Parliament was given power to make laws for the carrying out by the parties thereto of the agreement, and every consideration of probability suggests that so definite a power was adequate to secure the validity of the measure of 1932. It must be remembered that, once a power is given, the method of exercising it is beyond legal control, and to interpret the power in a narrow sense, as it was interpreted by the minority of the court, would in effect have been to substitute the discretion of the court for that of the Parliament, an encroachment of the judicial on the legislative power. Nor must it be ignored that by subsection 5 the agreement was made binding on the Commonwealth and the States, despite anything contained in their constitutions or legislation, a provision which could be invoked to negative the application to the payments required by the agreement of the necessity of observance of the rule of Parliamentary appropriation by the State.

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[1] *Auckland Harbour Board* v. *The King*, [1924] A.C. 318, 326, 327.

[2] *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co., Ltd.*, 31 C.L.R. 421.

[3] *Troops in Cape Breton Reference*, [1930] S.C.R. 554.

[4] The Ottawa Agreements were in all cases submitted for Parliamentary sanction for their duration.

**The Finality of the High Court's Jurisdiction.**—It is not surprising that an effort by the State to secure the right to appeal to the Privy Council received short shrift from the High Court.[4] On one occasion only has such permission been given, and it is notorious that the result of the appeal was distinctly unsatisfactory to Australian legal opinion. In the present case there could be pleaded a distinct cleavage of opinion in the court, and the great importance of the issue in its bearing on the rights of the States. But neither ground was ruled by the court, with but one dissentient, to be sufficient ground for allowing an appeal. Nor indeed would it have been reasonable to expose Australia to the grave delay which any appeal must involve. Moreover, seeing that the High Court has held that the task of the interpretation of the Constitution was deliberately entrusted to it by the framers of the Constitution, it could not with any consistency permit the Privy Council to pass judgment on an issue of this kind. From the imperial point of view such an appeal would be most embarrassing to the Privy Council, for a decision in favour of the Commonwealth would have certainly been denounced by extreme Labour opinion in Australia as another proof that the Privy Council was animated by economic prejudices in favour of British interests. It is, of course, impossible to minimize the unfortunate effect of the whole dispute on the status of the States, but the blame must rest on the government of New South Wales and not on the Commonwealth. It is significant that the governments of Victoria and Tasmania alike intervened to support the contentions of New South Wales, in so far as the derogation from State legislative sovereignty was concerned.

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[1] See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 259–61.

[2] *Australian Railways Union* v. *Victorian Railways Commissioners*, 44 C.L.R. 319, 352 per Isaacs J.

[3] *New South Wales* v. *The Commonwealth*, 46 C.L.R. 155.

[4] *Ibid.* (No. 2), 46 C.L.R. 235.

**The Sovereignty of the States.**—Incidentally once more a certain measure of disfavour was displayed by certain justices of the High Court towards the application of the term sovereignty in connexion with the States, stress being laid on the fact that for certain matters the States are subject to the control of Commonwealth legislation. The issue seems, however, rather one of terminology than of substance. It is clear, as Evatt J. pointed out, that in certain reserved spheres over which the Commonwealth has been given no authority the States do exercise uncontrolled legislative power and executive authority, and that in these aspects they may fairly be styled sovereign, without any abuse of that term. Clearly it is impossible to call the Commonwealth sovereign in matters which it cannot in any degree deal with, and that sovereignty for certain purposes should in a federation be divided among the various governments and Parliaments is hardly open to objection as a juridical conception.

**Delegated Legislative Power in the Commonwealth.**—We owe to the desire of the government of Mr. Scullin in the Commonwealth to give a preference in the loading and unloading of inter-State and overseas shipping to members of the Waterside Workers' Federation, a body of advanced labour views, an interesting series of cases exploring the power of the Commonwealth Parliament to delegate legislative power to the executive.[1] The difficulty, of course, arises from the formal constitution of the federation with its effort to distinguish between executive, legislative and judicial powers. The distinction between the first two of these powers and judicial power is moderately intelligible, and it has been accepted by the Privy Council.[1] But prior to these new cases the issue had never been fought out seriously in the courts. This was in part due to the fact that the most important instances arose during the war period, or out of war period legislation when the courts were certain to take a generous view of the ambit of legislative power. It was naturally more difficult to see that the Governor-General in Council under authority to regulate transport work could give a preference to a set of workers whose political support was assured to the Labour government. But the High Court insisted that motive was immaterial, and that all that must be considered was the issue whether the exercise of the power fell within its ambit, and whether the Parliament could delegate power. The justices all held such delegation valid, though Dixon J. brought out the difficulties which arose, under the decisions on the American Constitution, of framing an intelligible doctrine of the extent of the power to confer what was essentially legislative authority on bodies other than Parliament. He pointed out, however, that British practice strongly supported the view that such delegation was valid. Evatt J. made a very interesting effort to put the position as to what is licit and what is forbidden; he denied the power of the Commonwealth Parliament to make a law regarding legislative power, simpliciter, *e.g.* to transfer absolutely to the executive the full Commonwealth power to deal with trade and commerce. Parliament, however, can transfer authority on a definite topic; such a law is indeed in part a law as to legislative power, but in essence it is a law as to the special subject-matter with which the executive is empowered to deal. The truth is that in abstract the question is insoluble; the courts in the United States and in Australia will have no real difficulty in deciding concrete issues.

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[1] *Huddart Parker Pty. Ltd.* v. *The Commonwealth*, 44 C.L.R. 492; *Victorian Stevedoring and General Contracting Pty. Ltd.* v. *Dignan*, 46 C.L.R. 73.

**The High Court's Powers on Appeal.**—The disadvantages of the rigid limitation of the High Court's power under the Constitution were neatly illustrated in the same case.[2] The regulations held valid had been disallowed by the Senate, but certain convictions had taken place under them, whence appeal had been brought. Could the court on appeal, having regard to the disallowance, rule that the fines need not be paid? The court held otherwise; it was merely a court of appeal;[3] all it must decide was whether, on the state of law existing when the convictions took place, the latter were legal. It could not review the cases in the light of subsequent events and overrule the convictions. This would involve exercise of original jurisdiction, nor was it even certain that under the Constitution[4] Parliament could confer such jurisdiction if it wished. In any case it had not been conferred. That the decision is correct seems as certain as that it is inconvenient.

**The Senate and the Executive.**—An interesting issue arose in this connexion regarding the powers of the Senate to disallow executive regulations. The general principle insisted on by the Senate is that it may not be denied the right to control subordinate legislation by the executive, and therefore any regulations made must be laid before it so that it can disallow them if it thinks fit, a period of fifteen sitting days being allocated within which such a motion to disallow must be intimated.[1] The question arose whether the Senate was bound to wait until it pleased the executive to submit regulations, or whether it could disallow as soon as the regulations were made effective by publication in the *Gazette*. The challenge came from the government, which insisted, when regulations had been disallowed, on enforcing its views by the immediate issue of another set to like effect. If this could not be countered by equally prompt action by the Senate, its power to disallow could plainly be rendered worthless, and it is not to be regretted that the High Court has negatived firmly the right of the executive to defy the Senate.[2] It ruled that the Senate might of its own motion take cognizance of the regulations and by suspending its standing orders annul them without waiting for their being placed before it by the government. It is difficult to deny the justice of the decision, and it is noteworthy also that the court was strongly disinclined to deal with an issue regarding the internal economy of the proceedings of the Senate. That the executive acted unconstitutionally can hardly be denied, for to re-enact immediately regulations deliberately disallowed by the duly appointed authority is to strain the Constitution. It had been hoped that the Governor-General might intervene, by refusing to sign the reissue of the regulations, but Sir Isaac Isaacs[3] felt that the question was not one of sufficient importance to justify a crisis between the representative of the Crown and the ministry, a fact which renders it the more satisfactory that the High Court was able to intervene. It is, however, clear that constitutional conventions are far too little respected by the Labour party in the Commonwealth. It is forgotten that the whole fabric of responsible government is artificial, and that its success in the United Kingdom is vitally dependent on acceptance by the parties of the rules of moderation and regard for the rights of minorities.

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[1] *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275.

[2] *Victorian Stevedoring and General Contracting Pty. Ltd.* v. *Dignan*, 46 C.L.R. 73, 86, 87, per Rich J.; 105–9 per Dixon J.

[3] Constitution, s. 73 (ii).

[4] *Ibid.*, s. 76.

**Ambiguities of Ottawa.**—The extreme difficulty of framing agreements which will not offer cause for disagreement as to their interpretation has been exhibited with remarkable promptitude by the diverse versions given in the United Kingdom and in the Dominions as to the effect of the Ottawa agreements. The agreement with Canada alone has furnished conflicts on two very vital points, the issue under Art. 1, whether Canadian exports to benefit by the new terms must be consigned from Canadian ports or at least merely pass through the United States on through consignment, or whether they may be consigned to the United States and exported thence, and the right under Art. 15 of British manufacturers and others to have direct access to the Canadian Tariff Board. No doubt such issues may be adjusted by personal conference, the opportunity for which in the case of Canada is easily afforded and has taken shape in the form of the Prime Minister's recent visit. But the question arises whether these trade agreements should not contain a simple procedure for reference of disputed issues to a small standing tribunal which could give reasoned decisions; if there is hesitation to accept the binding character of such decisions, they might at least be advisory on the analogy of the tribunal erected under the Boundary Waters Treaty with the United States. Reference to the possible inter-imperial tribunals envisaged by the Imperial Conference of 1930, as suggested by Professor Mackay in an address to the Canadian Political Science Association in May 1932, is open to the objection that these bodies are merely facultative and have to be constituted *ad hoc*, perhaps the worst way of creating bodies which can be expected to give impartial rulings. The matter is important, for the proceedings in the Dominion Parliaments indicate that much friction may be generated between parts of the Empire in the operation of the compacts. The proceedings in the Dominions have illustrated a striking diversity of view on the constitutional issue, much discussed in the United Kingdom,[1] of the duration of the compacts; it seems fairly certain that on a change of government a new ministry will claim the right to reopen the question.

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[1] Acts Interpretation Act, 1901–1930, s. 10.

[2] *Dignan* v. *Australian Steamships Pty. Ltd.*, 45 C.L.R. 188.

[3] He acted similarly in respect of Mr. Scullin's request for a dissolution of the Commonwealth Parliament, November 25, 1931, stressing the effect of the change in position of the Governor-General.

**Iraq and the United Kingdom.**—The termination of the mandate over Iraq by the entry of that State into the League of Nations on October 3, 1932, unquestionably affords grounds for satisfaction to believers in the value of the mandatory system. For the United Kingdom the position now created is one of great delicacy and some difficulty. The necessity on imperial grounds of retaining an air force in the territory under treaty exposes the British Government to the risk of being virtually compelled in the event of local disorder arising from unwise government to afford the aid of that force to repress the results of a policy which was adopted without British responsibility, and of which British opinion would not approve. The same issue in New Zealand produced the gravest friction which ever existed between a British colony and the United Kingdom in the period 1865–70. In the case of the Indian States the fact of British responsibility for order has necessitated assumption of an ultimate overriding control of State policy under the claim of paramountcy, and in Egypt it is admitted that the presence of the British garrison raises problems not easy of satisfactory solution and still wholly unsolved. It is therefore earnestly to be hoped that the general prudence with which the government of Iraq has hitherto been conducted may continue operative, and that the British forces may be confined to their legitimate imperial purposes.

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[1] *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, p. 264.

# NOTES.

**The Editorship.**—For seven years, of which the first was in collaboration with Sir Maurice Amos, Dr. Walton has edited the Society's *Journal.* During that time he has succeeded in enlisting the help of a number of foreign writers of reputation, and has placed their work before readers by translating their contributions. Their assistance, like the work of the Editor, is entirely honorary. In doing so he has not forgotten the interests of the Dominions and other parts of the Empire, whose co-operation has always been especially welcome in the work of the Society. Having regard to the length of service which he has rendered and the serious demands made upon the Editor to which he has so fully responded, the Committee did not feel that they could resist his request to be released from that undertaking. They desire to place on record an expression of cordial thanks on behalf of the Society for his unsparing and successful exertions in maintaining and increasing the efficiency of the *Journal.* As the only available token of their appreciation the Society have elected him an honorary member. As a further contribution to the work of the Society, Dr. Walton has been able to secure Dr. F. M. Goadby as his successor. Dr. Goadby is a member of the Society of long standing, with a knowledge of different systems of law, and the Committee welcome him cordially as the new Editor. Although, as a matter of practical convenience, the present number bears his name, his absence from England will not enable him to be the active Editor until the next issue.

ATKIN.

**Comparative Legislation in Practice.**—Since the formation of the Society of Comparative Legislation nearly forty years ago, much work has been carried out in studying the operation of the laws on the same subject in different countries. British legislation has been affected by precedents from foreign countries and the Dominions. A notable example is the national system of health insurance which was copied in its main features from Germany. Dr. McCleary, who was formerly a Principal Medical Officer of the National Health Insurance Commission, has provided a useful summary of the working of the various laws (London: H. K. Lewis, 6*s.*) in which he is much indebted to the comprehensive collection of Health Insurance laws issued by the International Labour Office. It is interesting to note that this book is based on lectures delivered at Johns Hopkins University, so that it is due to American interest in the subject, to which we owe also Sir Arthur Newholme's valuable *International Studies on the Relation between the Private* *and Official Practice of Medicine.* The important feature of Dr. McCleary's book, which can be gained generally from any similar comparative study, is that it provides a prognosis. In the development of health insurance there is a tendency to place it on a compulsory basis. Even France, which has strenuously opposed its introduction, gave legislative sanction in 1930. Several of the British Dominions are moving in the same direction. The number of occupations covered by insurance is increasing. Medical services become more important than cash benefits. The medical profession takes a larger part in the administration and even influences new legislation. In a new edition of the book Dr. McCleary might give rather more attention to Dominion experience, but as it stands his work is a good example of the practical valuation of comparative legislation.

**Uniformity of Commercial Law.**—It is significant that business men have taken the lead in securing uniformity of law, especially within the British Empire. Bankruptcy law is the latest to receive attention. A special Committee of the Federation of Chambers of Commerce of the British Empire has been working on the subject and compiled a comprehensive summary (published by the Federation, 97 Cannon Street, London, E.C.4, 10*s.* 6*d.*) of the laws in force in the different parts of the Empire since no publication was available to provide the necessary information. The digest is mainly devoted to those points which are of practical interest to business men. The result shows that in eight parts of the British Empire there is no bankruptcy law, and in eight others there is legislation based upon the English law in operation before the Act of 1883. The Bankruptcy Act of 1883, which introduced fundamental alterations in the English law, was the first of the statutes dealing with commercial law drafted by the late Sir Mackenzie Chalmers, and there is no doubt that the excellence of the draftsmanship did much to commend them to the English-speaking peoples. Another group of parts of the Empire have law practically the same as the present English law, while in the chief British Dominions the law differs in basic principles from the English law. The Committee have not been able to include particulars of the cost of bankruptcy proceedings, although they recognize it to be of practical importance. The Committee confine their recommendation upon the result of their investigation to a plea for greater uniformity based upon the English law, and that the bankruptcy law should be introduced in parts of the Empire which have none.

**Annuario di Diritto Comparato e di Studi Legislativi.**[1] The important work now being done by the Istituto di Studi Legislativi under the direction of Professor Galgano deserves the interest and attention of all students of comparative law. The earlier stages of the work have already been noticed in this *Journal*.[2] The greater part of the present volume is occupied with seven articles contributed by authors from

[1] Vol. vii, Fasc. ii. (Istituto di Studi Legislativi, Rome.) 1932. Pp. 302.

[2] Vol. xii, p. 115.

various countries. Of these two deal in general terms with the new Italian Civil Code and with the draft Italian code on maritime law. Mr. Alexander Cairns discusses those articles of the Italian Code which deal with filiation and legitimation in the light of the relevant rules of English law. Professor Guyot compares the text of the Italian and French law on the subject of alimentary provision. Professor Nast of Strasburg contributes a learned article on the present position of private law in Alsace and Lorraine. The longest contribution is from the pen of Professor De Semo, who deals with the problem of the unification of national laws on the subject of bills of exchange.

**International Institute of Public Law.**—The *Annuaire* of the Institute for 1932, which is the fourth of the series, maintains the high character of its predecessors.[1] It gives the full text in French of all the important constitutional laws of the principal countries and of many enactments affecting public law which are not in a narrow sense constitutional. We might draw attention to the new constitutional laws of Spain, including the " Statut Catalan," to the new laws of administrative procedure in Austria and to our own Statute of Westminster.

There are also summaries of judicial decisions, but only, rather oddly, for Great Britain. The opinions of the Judicial Committee in *Eshugbayi Eleko*[2] and in *Commissioner for Local Government Lands and Settlement* v. *Kaderbhai*[3] are criticized.

In addition, there are as usual valuable reports on matters of public law, among which special mention should be made of the fascinating study by M. Roger Bonnard of the developments in French administrative law.

F. P. W.

**Sterilization.**—The reviews of legislation published by the Society have duly chronicled the laws passed from time to time to deal with sterilization in the United States. Since the first law was passed in Indiana more than a quarter of a century ago, public opinion in its favour has made considerable progress. Dr. Landman, in a comprehensive textbook[4] dealing with the social, legal and medical aspects of the subject, goes so far as to say that *Buck* v. *Bell* (1927) 47 Sup. Ct. Rep. 584, 274 U.S. 200 " has definitely committed the United States to a policy of human sterilization for good or for bad as a manner of coping with the socially undesirable in our midst." Twenty-seven States have valid and legal human sterilization laws on their statute books. The legislators, however, he regards as having fallen a prey to the pessimistic eugenics of well-endowed race betterment institutions. With sterilization as a policy it is not the business of this *Journal* to deal, but it may be noted that Dr. Landman's conclusion, " human sterilization, as a social program, requires more scientific evidence," has been adopted by the British Medical Association, and carried out by the appointment of a Committee by the Minister of Health under the direction of the Chairman of the Board of Control.

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[1] *Annuaire de l'Institut International de Droit Public*, 1932. (Paris: Les Presses Universitaires de France). Pp. 938. Price 130 francs, bound.

[2] 145 T. L. R., p. 297.

[3] [1931] A.C. 652.

[4] *Human Sterilization.* (New York: Macmillan & Co.)

In Europe, only Denmark, Finland and the Canton of Vaud, Switzerland, have enacted legislation dealing with sterilization. In the British Empire, Alberta is the only place where the voluntary sterilization of mental defectives is the law of the land since 1928. A useful account of the working of the Act was given by Miss Hilda Pocock in the *Eugenics Review* (July 1932), together with particulars of the Sterilization Act of Michigan which, although passed in 1923, has only been actively in operation since 1929.

**The Malta Constitution.**—Dr. Colombos sends a criticism of Professor Berriedale Keith's notes in the last issue of the *Journal* (pp. 274–6) upon the Malta Royal Commission and the new Constitution. Admittedly, the subject is one upon which there has been a substantial difference of opinion, and, even if the pages of this *Journal* were the suitable place to deal with it, no good purpose could be served by reviving controversies which in the interests of all parties are best forgotten. Dr. Colombos recognizes that " the present Constitution of Malta is not so rigid as to be incapable of development and adjustment as to accord both with local opinion and Imperial interests." He hopes that the " innovation " of withdrawing from the control of the government of Malta the appointment and removal of judges " will neither be maintained nor followed as a precedent in any other part of the Empire." He contends that " it is in fact and in law a derogation from the original grant of self-government " and " that the Maltese people should not suffer this *diminutio capitis*." Similarly, he looks forward to the time when the 1921 Constitution will be integrally restored to the Maltese people with the addition of such improvements as the highly advanced political maturity of the local electors justifies. Upon the language question, which in Malta, as elsewhere, is a matter of controversy, Dr. Colombos supplies some recent statistics of interest :

> A plebiscite of the people on the language question followed in September 1932, when the parents of 19,387 pupils were asked specific questions as to whether or not they desired their children to be taught Italian and English in the elementary schools as well as Maltese. The results, which were published in the *Government Gazette* on October 1, 1932, were as follows : " The parents of 2,519 children objected to Italian being taught, while the parents of 16,868 children, *viz.* approximately 88 per cent. of the total number, expressed their desire to have their children taught Italian from Standard I upwards after school hours."

Upon this Dr. Colombos points out that " both English and Italian are indispensable to the Maltese people situated as they are in a key position in the Mediterranean."

**The Library of the Royal Empire Society.**—Another stage has been passed in the publication of the catalogue of the Royal Empire Society's Library by the issue of the third volume covering Canada, Newfoundland and the West Indies. For the first time an attempt has been made to co-ordinate and bring together publications relating not only to the British portions of the American continent but also to the colonial period in the present United States. A catalogue of this comprehensive character not only shows the wealth of the collection, but also, as the librarian suggests, directs attention to the serious gaps in the collection. Although, for example, there is the booklet containing the Constitution of the Canadian Bar Association, it does not seem as if the library possesses the annual reports. Omissions of this character might have been rectified in the course of the compilation of the catalogue. A particularly valuable section, of which this volume contains full particulars, includes the complete reports upon various boundary disputes. There is also a very valuable series of colonial Blue Books giving an annual statement of progress and development. Many of the earlier volumes are in manuscript and contain information which is available in no other form. The catalogue accordingly is an essential work of reference in all parts of the Empire.

# NOTICES OF BOOKS.

## THE CONSTITUTION OF THE EMPIRE.

MR. R. P. MAHAFFY has given us a clear and concise exposition of the *Statute of Westminster*, 1931,[1] in a compact and handy form. On that enactment for the time being it is probably impossible to write much that is new; as the work of many minds, it presents difficulties of interpretation which will doubtless busy the courts when the Parliaments of the Dominions begin to take advantage of its terms. It is worth notice that already in *Croft* v. *Dunphy*[2] the Privy Council has declined to pronounce on the issue whether s. 3 with its grant of extra-territorial power is to be deemed retrospective in operation or not. Mr. Mahaffy's own comments are sound and to the point, but it is curious that he ignores in his account the famous decision of the High Court of the Commonwealth in the *Union Steamship Co. of New Zealand* v. *The Commonwealth*,[3] which by its stress on the doctrine of repugnancy in the vital field of merchant shipping must be admitted to have been one of the causes of the Resolutions of the Imperial Conference of 1926. He is mistaken also in thinking that Newfoundland has had to wait until the Statute of Westminster to be formally styled a Dominion. This recognition will be found as early as the Copyright Act, 1911, and the British Nationality and Status of Aliens Act, 1914, while of course in a sense it dates from the Colonial Conference of 1907.

There is a curious misunderstanding of the import of s. 4 providing that no Act of the United Kingdom shall extend to a Dominion "as part of the law of that Dominion," unless with Dominion assent recited in the Act. It is suggested that the draftsman seems to have feared that, unless the words were inserted, it would have been impossible for the Dominions to extend to English laws the comity which they extend to *e.g.* German laws, and he illustrates this view by the example of *Mitford* v. *Mitford*,[4] which he regards as an example of a German law permitting cancellation of marriage because of incompatibility of temper being given effect in England. Whether *Mitford* v. *Mitford* is now sound law may be doubted, but it really illustrates something rather different, the respect due by English to foreign courts in decrees affecting status.[5] The statute deals with a very different point, and one that is probably of considerable importance. It was feared that, if the clause stood without the words inserted, it would be possible for a Dominion to deprive the Imperial Parliament of the power to pass legislation applying to British subjects, domiciled or normally residing in the United Kingdom, principles of conduct which even outside the United Kingdom they must observe.[1] There is in existence a considerable body of enactments which bind British subjects in other parts of the world than the United Kingdom, *e.g.* the law as to murder or bigamy; such Acts a Dominion by s. 2 of the statute can repeal only so far as they are part of the law of the Dominion, not so far as they are part of British law, and the same principle applies to future legislation of the United Kingdom. Very possibly the words might have been assumed to be needless, and the power regarded as implicit, but the British Government held their insertion desirable and the Dominion representatives recognized that they might properly be inserted. No doubt in future legislation the British Government may have to consider carefully to what extent it will bind nationals of the Dominions when outside the United Kingdom, but that is part of the inevitable result of accepting equality of partnership in the Empire.

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[1] *The Statute of Westminster*, 1931. (London: Butterworth, 1932.) Pp. xi + 19. Price 7*s*. 6*d*.

[2] 48 T.L.R. 652.

[3] (1925) 36 C.L.R. 130; Keith, *Responsible Government in the Dominions* (1928), i, 349.

[4] [1923] P. 130.

[5] Dicey and Keith, *Conflict of Laws* (ed. 5), pp. 433, 437.

To Dr. Hans Walter we owe one of the best Continental appreciations of the vexed issue of *Die Stellung der Dominien im Verfassungssystem des Britischen Reiches im Jahre* 1931,[2] which is the fourth of the monographs of the Kölner Arbeiten zum Englischen Recht. Dr. Walter's work is thoroughly up-to-date, and he shows a keen appreciation of the realities of the situation, as for instance in his careful refutation (pp. 16–18) of Dr. Rynne's ingenious effort [3] to make out that the Irish Republicans were recognized by the British Government as a State and that the Free State thus has a different status in the Commonwealth from its other parts. He recognizes (pp. 96, 97) that the new status of the Commonwealth will not fit any of the traditional categories, and that in estimating it there must be borne in mind three factors: the autonomy of the Dominions; the peculiar position of the United Kingdom with its Parliament, which cannot relinquish its sovereignty though it can set bounds to its exercise, its Foreign Office, which in fact still controls the foreign policy of the Empire, and the Privy Council in its judicial functions, "*der noch immer für die Dominien Recht setzt, nicht nur Recht spricht*"; and the elaborate scheme of conventional arrangements which causes the whole organism to work effectively. Some of his discussions may seem to the Dominions to ignore in some degree their independence, but he stresses quite fairly (pp. 91, 92) the fact that between the parts of the Empire. international law does not hold, differing in this from Dr. Baty's ingenious view that the Dominions are distinct States.

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[1] Keith, *Speeches and Documents on the British Dominions*, 1915–1931, pp. 213, 214

[2] (Leipzig: Tauchnitz, 1932.) Pp. 99. Price M. 4.50.

[3] *Die völkerrechtliche Stellung Irlands*, pp. 44 ff.

Mr. Justice Terrell's discussion of *Malayan Legislation and its Future*[1] deals, in part, very ably and in a spirit of moderation with the problem which has so recently engaged British interest, the relation of the legislative and judicial functions granted to the executive to the rule of law and the control of Parliament. It is interesting to note that like issues have arisen in the Straits Settlements and the Malayan States. The Straits Banishment Ordinance is clearly open to exception, for it authorizes the Governor in Council to banish after inquiry any person not a natural-born British subject, a power no doubt necessary and wisely used. But quite needlessly it provides that a banishment order is conclusive evidence in the courts that the banishee is not such a British subject, a form of enactment which is only excused, if at all, by the care taken by the Executive Council not to banish any person whose claim to be such a subject has any basis. There is also a good deal of delegation of powers to license to officers from whose decision there is no appeal to the courts, and who are left without clear guidance as to principles of action, and it seems that rather too much latitude as regards forfeitures is left in the hands of non-judicial officers.

Much interest attaches to Mr. Terrell's criticisms of the present legislative chaos (ch. iii) in the Malayan States. There is clearly much to be said for his plea for uniformity of legislation whenever possible throughout the area, and the suggestion that law drafting should be concentrated in the office of the Attorney-General of the Straits, and not left to be undertaken separately in the Malayan States, seems thoroughly sound. Draftsmanship is a very technical art, and the variation of law in such an area as the States is much to be deprecated, whenever it is not demanded by imperative considerations of local necessity. Equally attractive is his suggestion of the revision of the judicial system of the Straits and the States, with a view to providing assimilation of procedure, the running of legal process throughout the area, and a better system of appeal. It is clear that in this regard uniformity is desirable, and that there is nothing to be gained by insisting on particularism.

A. BERRIEDALE KEITH.

## THE JAPANESE COMMERCIAL CODE.

THE first volume of this important work[2] appeared only last year, and was reviewed in this *Journal* in February last.[3] The commendably prompt appearance of the second and concluding volume will be welcomed. Inasmuch, however, as the general character of the work was explained in the previous notice, it will not be necessary to review at length this second volume.

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[1] (Singapore: Malaya Publishing House, 1932.) Pp. 91.

[2] *The Commercial Code of Japan* (Annotated), vol. ii. Published by the Codes Translation Committee of The League of Nations Association of Japan. Tokyo, 1932. (Agent, Maruzen Co., Ltd., Tokyo.) Pp. iv + 857.

[3] Vol. xiv, pt. i, pp. 62–5.

Books I and II of the Code (comprised in Volume I of the translation) are of a general character ; being concerned, in effect, with the definition of the persons, natural and juristic, to whom the Commercial Code applies. Books III–V (contained in Volume II) deal with the subjects with which Commercial Law is concerned. Book III treats of Sale, Agency, Carriage of Goods and Passengers, Deposit of Goods, and Insurance, together with one or two miscellaneous topics, such as Account Current and Undisclosed Association. Book IV sets out the law on the subject of Bills (including Promissory Notes and Cheques) ; while Book V deals with Maritime Commerce. A very valuable Appendix includes the Law concerning the Operation of the Commercial Code, and eleven recently concluded international conventions, mostly concerned with the unification of the laws of different countries, having application to the subjects dealt with by the Code. In regard to these last, it would have been an added convenience if particulars as to date of the ratification of these conventions, and their consequent operation, had been given. It is not always easy for the general reader to verify these details.

The first general impression which an English lawyer receives on reading this volume is of the extraordinarily strong likeness between English and Japanese law on the subjects with which it deals. The writer's knowledge of English maritime law does not qualify him to speak confidently as regards that topic. But in such matters as the contracts of Carriage and Deposit, for example, and in the Law of Negotiable Instruments, the similarities are so striking as to suggest conscious borrowing, though with important reservations. For example, the general liability of the carrier of goods by land for loss of or damage to goods (" Act of God or the King's enemies " being expressed by the translators as *vis major*) is substantially the same as in English law (Arts. 336–42) ; but one notes the interesting provision (Art. 333) that the consignor of goods through a carrier by land can demand as of right a bill of lading, which (Art. 335) can be used to effect delivery of the goods to the consignee, with the familiar consequences set out in *Lickbarrow* v. *Mason*, and s. 1 of the English Bills of Lading Act, 1861. The exigencies of business would, perhaps, hardly permit of an application of this rule in England ; but there can be little doubt that it would save many disputes.

In the cases of carriage by sea and negotiable instruments, as well as marine insurance, the resemblances between Japanese and English law are more easily explicable ; for these matters have always had an international character—a fact which renders the task of the unifier of law comparatively easy in respect of them. But there is no such simple explanation for the striking similarities between the English and the Japanese Law of Insurance (other than marine), *e.g.* in such matters as insurable interest (Art. 385), necessity of *uberrima fides* (Art. 399 (2)) and the form of policy (Art. 403). Indeed in one important detail the Japanese Code seems to have anticipated later English legislation ;[1] for it has provided in Art. 404 that, when the insured has assigned the subject-matter of the insurance, he shall be presumed to have assigned at the same time the rights arising from the contract of insurance.

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[1] Law of Property Act, 1925, s. 47.

On the other hand, there are differences between English and Japanese law which are striking and suggestive. Taking one or two at haphazard, we may note the tendency of the Japanese Code to cut down the duration of rights by severe rules of prescription. Thus, while the normal period of prescription for commercial rights is five years (Art. 285), the claim of a forwarding agent against a principal or consignee (Art. 329), of a pledgee against a pledgor (Art. 374), of an insurer for premiums (Art. 417), of a guest at a hotel for damages against the proprietor for damage to or loss of goods (Art. 356), and many others, prescribe in one year. The legal rate of interest on commercial debts, where not fixed by the parties, is 6 per cent. (Art. 276). A warehouseman cannot demand payment of charges for storage except at the time when the goods are taken out (Art. 377). The holder of a cheque must present it for payment within ten days from its date, on pain of losing his rights against prior parties (Art. 533); and, by the apparently severe but rather wholesome provision of Art. 536, a person who draws a cheque in excess of the amount which he can require the bank to pay renders himself liable to an " administrative penalty " up to 1,000 yen. But the most startling rule (to an English lawyer) in the matter of cheques is, that the loss resulting from the payment by a bank of a forged cheque falls on the person whose name has been forged (p. 291). It is true that this rule is not embodied in the Code; but it rests on a decision of the Tokyo Court of Appeal, given so recently as November 1926.

The usefulness of the volume under review is greatly enhanced by the abundance and fullness of the examples given by the editor to illustrate the various Articles of the Code. These are, like the " authorities " of an English textbook writer, either statutes or decisions of the courts—mostly the latter. In this connexion, reference may be made to the observations on judicial precedent in our review of the first volume of the Code.[1]

Moreover, the skill shown in the drafting of the Code has been great. There could hardly be, for example, a neater statement of the doctrine of " insurable interest," before referred to, than that contained in Art. 385. " Only such interests as can be estimated in money may be made the subject-matter of a contract of insurance." And there are many such happy turns of phrase, which, perhaps, can only be appreciated at their true value by those who have had practical experience of the difficulties of codification.

Nevertheless the inherent difficulties of any attempt to state a comprehensive rule of law in precise and exhaustive words are illustrated by Art. 286 of the Code, dealing with the rights of a seller in a case in which the buyer has refused to take delivery of the goods. It is intended that this provision shall apply only to commercial transactions; and this intention is expressed in the opening words of the Article: "If, in the case of a sale between traders . . ." Now this form of words at once raises two questions: (1) Does the provision apply to the case in which two traders enter into a contract of sale in respect of an article wholly unconnected with their respective businesses, *e.g.* two wine merchants do a deal over the private motor-car belonging to one of them? And, if this question be answered in the negative, on the ground that, *quâ* the transaction in question, the parties are not "traders," then arises the further question: (2) Suppose that both parties are traders, but the sale is only as to one of them a commercial transaction, *e.g.* one of the wine merchants sells a dozen of wine to a corn merchant, is this a case to which the provision applies? As a matter of fact, the editors of the English translation of the Code, in a footnote, say that both parties to the sale must be traders (which is fairly obvious); but they go on to say: "and the sale itself must be a commercial transaction in respect of at least one of such parties." No authority whatever for this statement is given; and the provision itself is capable of quite a different meaning. But an English critic of the Article in question should remember that his own law comprises an equally imperfect piece of legislation. By the well-known subsection 6 of s. 25 of the Judicature Act, 1873, "any absolute assignment, by writing under the hand of the assignor . . . of any debt or other legal chose in action, of which express notice in writing shall have been given [to the party liable to satisfy it] shall be, and be deemed to have been effectual in law to pass and transfer the legal right to such debt or chose in action from the date of such notice." The framers of that subsection seem to have forgotten the general principle, that assignments by act of the parties require the acceptance of the proposed assignee to become effectual; and it took quite a little series of actions[1] to distinguish between a mere direction to the party liable (which could of course be revoked by the intended assignor) and a complete and effective assignment. Such incidents raise very grave doubts as to the superiority claimed for legislation (and especially for codification) over a more elastic form of law-making. In each of the examples quoted, it has been found necessary, in order to prevent injustice, to alter the express words of a statute.

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[1] Vol. xiv, pt. i, pp. 63–4.

EDWARD JENKS.

## CONFLICT OF LAWS.[2]

DICEY'S *Conflict of Laws* still holds the field in this complex branch of jurisprudence, and this new edition—the Fifth, like the two previous ones, is lucky in its editor. It is no vain boast of Dr. Berriedale Keith that he has "adhered essentially to the plan adopted by Professor Dicey of a statement of the rules laid down by the English courts without attempting any criticism of doctrines which have been definitely established." There are nearly ninety more pages in the new than in the Fourth Edition, which was published in 1927, the enlargement being due in part to the inclusion of about 1,000 new cases, including a considerable number in the American and British Dominion courts, which show the development of case law in the English-speaking world in regard to disputes where the municipal laws do not necessarily coincide but the principles of international private law are brought into play.

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[1] *Rogers* v. *Whiteley*, [1892] A.C. 118; *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K.B. 110; *Rekstin* v. *Komseverputj Bureau*, (1932) 48 T.L.R. 578.

[2] *A Digest of the Law of England with reference to the Conflict of Laws.* By the late A. V. Dicey, K.C., Hon. D.C.L. Fifth Edition, by A Berriedale Keith, D.C.L., D.Litt., Barrister-at-Law, of the Inner Temple. (London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd.) Pp. cxxxiv + 1144. Price £2 15*s*. net.

"It can hardly be said," writes the learned editor in his preface, "that legislation and jurisprudence since 1926 have done much to clear up disputed issues of the Conflict of Laws." He proceeds to lament the fact that the Legitimacy Act, 1926, only partially brings into operation the relief of *legitimatio per subsequens matrimonium*, as it is allowed on the Continent and in Scotland. It is still, of course, impossible for an English person born before the marriage of his parents to become legitimated here, if one or other of his parents was not in a position to marry when the person was born. This restriction was imposed by the ecclesiastical influence in the House of Lords on the ground of public morality. But there is a striking exception to this rule, illustrating the retrospective effect of a decree of nullity in declaring that there never was a marriage; *i.e.* if a prior marriage is annulled on the ground of incapacity, a child begotten by one of the parties of another woman during the subsistence of the pseudo-marriage may be legitimated by the subsequent marriage of the child's parents: *Newbould* v. *Att.-Gen.*[1] In passing it may be noted that there is a reference in the index to this case as on p. 324, which is clearly mistaken. The Act, however, does give a full measure of legitimation *per subsequens matrimonium* in the case of a child of a British subject, domiciled abroad, who married the mother after the child's birth, though one of them was married to another person at the time of the birth, providing that the *lex domicilii* permits such legitimation: *Collins* v. *Att.-Gen.*[2] This Act has rendered changes necessary in Note 19 (Appendix) at pp. 952 *et seq.*

The editor notes that Dicey's principles as to *renvoi* are confirmed by the important cases of *In re Ross*[3] and *In re Askew*.[4] On the vexed question of domicil he comments in the preface on the recent cases of *Att.-Gen.* v. *Yule*[5] and *Boldrini* v. *Boldrini*,[6] in which latter case it was decided by the Court of Appeal that, despite the possibility of an alien's being deported, an alien may yet acquire an English domicil. He notes that the Scottish case, *Grant* v. *Grant*[7] disposes finally of the "outworn doctrine of Anglo-Indian domicil," but the real deathblow to this doctrine is found probably in the Indian and Colonial Divorce Jurisdiction Act,

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[1] [1931] P. 75.
[2] (1931) 47 T.L.R. 484 (Dicey, p. 307).
[3] [1930] 1 Ch. 377.
[4] [1930] 2 Ch. 259.
[5] 145 L.T. 9.
[6] 48 T.L.R. 94.
[7] [1931] S.C. 238.

1926, which is discussed on pp. 946–7. That Act, as is pointed out, is very imperfect in its attempt at introducing concurrent jurisdiction into divorce, and one can only echo Dr. Keith's view that it is unsound in depriving the English and Scottish courts of their right to refuse to recognize decisions of foreign courts obtained by fraud.

The rigid rule that domicil is the only test of jurisdiction in divorce (to which the only exception is the statutory innovation just mentioned) is critically considered. It is pointed out that Canada has departed from this rigid rule in the case of a deserted wife whose husband has gone abroad. So has New Zealand, and in most European States the same exception (together with other exceptions) holds good. One entirely agrees with Dr. Keith in his view of *Nachimson* v. *Nachimson,*[1] in which the Court of Appeal reversed what seemed to be an eminently sound decision of Sir Maurice Hill as to the invalidity of a Soviet marriage which could be dissolved at the will of either party, the Soviet court being bound to make a decree. " There seems a good deal to be said," writes the editor," for the view that the application of the English conception of marriage to a relation so widely different in character is likely to produce more inconvenience than benefit." It should be observed, however, that as since 1927 a Soviet marriage may be dissolved at the will of either party by mere registration, without any reasons, the Court of Appeal might take a different view of such a marriage, dissoluble without notice to the other spouse and without any judicial proceedings.

The case of *Salvesen* v. *Administrator of Austrian Property*[2] has in some quarters been given an exaggerated importance, owing to its plethora of *obiter dicta*, but Dr. Keith reduces the value of the case to its proper proportions when he says that it might easily have been disposed of, merely on the ground that a decree of nullity by the court of the domicil was valid. That would merely have been following precedent, but the said *dicta* have led to a conclusion (actually accepted in *Inverclyde* v. *Inverclyde*[3]) that jurisdiction in nullity for impotence rests on the same basis as jurisdiction in divorce, so that a decree can only be granted by the courts of the domicil. " Such a doctrine," he says, " would lead to very inconvenient results, and there exists, of course, between a decree of nullity and a decree of divorce the fundamental difference that the former declares a marriage void *ab initio*, while the latter annuls it only from the date of the final decree." He adds that if in *Inverclyde* the English court had accepted fully the Scottish doctrine of *forum non conveniens*, the case might have been dismissed properly on that ground alone (the domicil being Scottish), without holding that the English court had no jurisdiction.

It may seem rather strange that so much of the preface to the new Dicey is taken up with matters in the matrimonial jurisdiction, but it so happens that in this particular field of jurisprudence these matters have been of transcending interest in the last few years. Before passing from the matrimonial jurisdiction, perhaps one may be permitted to say that there seems to be only slight authority for the principle which has figured for so many years in Dicey's *Conflict of Laws* that " the courts of a foreign country where the parties to a marriage are not domiciled have jurisdiction to dissolve their marriage, if the divorce granted by such courts would be held valid by the courts of the country where at the time of the proceedings for divorce the parties are domiciled." [1] Mr. J. A. Barratt, K.C., at a meeting of the Grotius Society on November 19, 1931, said that this exception was misleading and arose from an erroneous view of the case of *Armitage* v. *Att.-Gen.*,[2] and the analysis he gave was so convincing as to call for a revision of this so-called exception.

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[1] [1930] P. 217.

[2] [1927] A.C. 641.

[3] [1930] P. 29.

Dealing with other branches of the conflict of laws, it is pointed out that the state of the law is still very uncertain as to the form of transfer of choses in action whose *situs* is English, when the assignment takes place out of England, despite recent cases. The learned editor also discusses the possible juridical effects of the Statute of Westminster, 1931, with regard to many phases as between the component parts of the British Empire, and particularly with regard to nationality.

The subjects of the thirty Notes or Appendixes are the same as in the last edition, subject to slight amendments or additions arising out of recent developments, and in this part, as indeed throughout the whole of this classic work, Dr. Keith has maintained the solid structure which for so many years has been a boon and a blessing to judges the world over.

William Latey.

## TRUSTS.

" To the Continental jurist trusts appear so astonishing, and make him feel so uncomfortable, that he is apt to see ghosts where in fact there is only a little obscurity. A little light is enough to cause all such spectres to disappear " (p. 368). It is the aim of this uncommon and uncommonly interesting book [3] to shed that light. In it M. Lepaulle,—who, in addition to his distinguished French legal qualifications, is a Doctor of Law of Harvard—has set himself a double task : first, that of expounding to Continental lawyers the nature of the Trust in Anglo-American law; and second, that of demonstrating that French law, at any rate, offers no serious obstacle either to the recognition by the French courts of trusts constituted abroad, or to the creation of valid trusts in France.

The subject is one of growing importance for Continental lawyers.

> Before the War, trusts rarely crossed the frontiers of the Anglo-Saxon world. At the present time, in France at any rate, they raise almost daily problems. The causes of this evolution, which are numerous, include :

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[1] Rule 99. Exception 1, at p. 430.

[2] [1906] P. 135.

[3] *Traité Théorique et pratique des Trusts en droit interne, en droit fiscal, et en droit international.* By Pierre Lepaulle, docteur en droit, docteur ès-sciences juridiques américaines, avocat à la cour de Paris. (Paris : Rousseau et Cie.) Pp. vii + 463. Price Frs. 60.

(1) the growing number of English and American citizens who come to live in France ; (2) the attraction which French capitalists feel for investments abroad, an attraction which leads them to entrust funds to Trust Companies, to buy " trust certificates " representing foreign nominative securities circulating in France as bearer bonds, to invest in " Investment Trusts," or to buy American debentures secured by mortgages organized in the form of " corporate trusts " ; (3) the economic necessity for regulating competition either by setting up " cartels," or, more simply, by organizing stable majorities in companies by means of " voting trusts ; " (4) the widespread desire to meet the growing complexities of the world by giving to a trustee in whom one has confidence wide discretionary powers to carry out one's general wishes in circumstances which cannot now be foretold ; (5) the establishment of the Bank for International Settlements which is the trustee for the implementing of the Young plan.

What is a trust ? To this question M. Lepaulle finds no single answer in our books in a form appropriate to the demands of the French legal mind. The answer which he proposes is to the effect—we renounce the attempt to translate—that " *le trust est une institution juridique qui consiste en un patrimoine indépendant de tout sujet de droit et dont l'unité est constituée par une affectation qui est libre dans les limites des lois en vigueur et de l'ordre public.*" The trustee is mere machinery, and the beneficiary need not be a person.

The writer goes on to demonstrate that the ideas of the *patrimoine affecté* or the *Zweck vermögen*, so far from being essentially repugnant to Continental jurisprudence, have already received sporadic recognition in France and Germany, in such examples as the *fondation*, the *succession vacante*, the estates of absentees, and above all, in the case of juridical persons.

After a chapter devoted to a survey of the wide variety of uses to which the trust is put in English-speaking countries, both in private and public law—in which the general superiority of this institution to comparable and competing Continental devices is pointed out, the writer gives six chapters—the greater part of the book—to a straightforward and lucid exposition of the general law of trust, under such headings as Express and Implied Trusts, the Res, the *affectation*, the Trustee, the " organs of control and supervision "—which include the *cestui-que-trust*, if any, himself—and the creation, normal functioning, and the winding up of trusts.

Chapter IX, on Trusts in Revenue Law, will be of particular value to practitioners on both sides of the Channel—or the Atlantic. Chapter X is directed to dispelling possible doubts as to the practicability of reconciling the Trust-idea to the French scheme of intelligible and lawful institutions : and a final chapter discusses Trusts in Private International Law, as understood both in the Anglo-American and in the French jurisdictions.

Generous as is M. Lepaulle's advocacy of the Trust, he concedes that there is one French institution which, in a particular sphere (though not in general) is capable of an application not open to the Trust. That remarkable product of modern French jurisprudence, the *stipulation pour autrui*, in effect permits an obligor to be a trustee of his own promise; and this doctrine enables, for example, A, by agreement with B, an insurer, to vest in C, the intended beneficiary of the insurance, an actionable right against B, without assignment or reliance on statute.

It would be impossible, without extensive quotation, to convey an adequate impression of the merits of M. Lepaulle's treatise. It must suffice to say that both to the student of comparative jurisprudence, and to the practitioner in international law, the 460 pages of his book offer profit, stimulus and pleasure of a high order.

We have noticed little occasion for criticism; but the suggestion on page 230 that the common-law rule against perpetuities contemplates the permissible life interest as being that of one single person in being at the time of the creation of the settlement seems to be a slip.

M. S. A.

## BUREAUCRACY IN SWITZERLAND.[1]

THE Harvard University Press has initiated a series of Studies in Systematic Political Science and Comparative Government with an analysis of the Swiss Civil Service by two well-equipped investigators, Professor C. J. Friedrich and Professor Taylor Cole. They look for three characteristics or criteria of bureaucracy: first, a determinate distribution of offices or functions among members of the organization; secondly, a determinate distribution of the powers of control and coercion attached to these offices; and thirdly, determinate qualifications required for fulfilling those functions. These requirements involve a certain professionalization; the candidate undertakes the work in consideration of a fixed salary, security of tenure and definite prospects of promotion. There are interesting converse responsibilities. The authors discuss the civil servant's right of association and his right to strike. Modern communities have elaborate public services; is the satisfaction of these public needs to be subordinated to the particular interests of the agents? When Switzerland had to meet a general strike in 1918, the Federal Council spoke strongly to the civil servants who contemplated "abandoning their posts." "In entering the service of the State you entered into a contract with the State involving some duties which you cannot legally lay aside." The employees of the State were placed under military law and their participation in a strike was declared a crime.

The authors do not accept the usual statement that bureaucracy has an inherent tendency to expand. They think that post-war experience in France shows the contrary. The machine, they suggest, needs careful lubrication in federal structures. A Prussian Minister of Finance has hinted that half the time of the higher officials in Prussia is consumed by controversies over their sphere of competence with officials of the Reich government. Democracy, the authors conclude, is not opposed to bureaucracy. The future of democracy depends on its ability to maintain a fully organized bureaucracy. " If a popular government is incapable of maintaining a bureaucratic hierarchy," it must give way to some other form of government which can accomplish the task, " whether it be the dictatorship of an individual or of a small group in the name of the nation, the people or the proletariat." Swiss experience offers evidence due to national character, geography and historical and political tradition. The Swiss system of State insurance is interesting. Sometimes there is close analogy with other countries. Switzerland, we learn, had to evolve the emergency ordinance in the Great War. This method was allowed even to alter or suspend the provisions of the Constitution. The Federal Court refused to review the Federal Council's authority in issuing such ordinances. After 1919, however, the ordinances were subject to subsequent approval by the legislative chambers.

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[1] *Responsible Bureaucracy, a Study of the Swiss Civil Service.* By Carl Joachim Friedrich, Assistant Professor of Government, Harvard University, and Taylor Cole, Associate Professor of Government, Louisiana State University. (Harvard Univ. Press, 1932.) Pp. xvi + 93.

The book is a welcome addition to the growing library of volumes on the machinery and atmosphere of government. At many points, *e.g.* the working of administrative tribunals, it offers useful parallels to English conditions as the latter are revealed in the recent report of the Donoughmore Committee on Ministers' Powers. Readers of that report will find a mass of material in the supplementary volumes containing the memoranda and evidence submitted to the Committee, the reasoned apologia of the official witnesses being balanced by the comments of critics from outside. All this literature serves at any rate one useful purpose if it compels those who use the word " bureaucracy " to think what else it may convey besides the implication of red tape and official brusquerie.

C. T. C.

## THE LAW OF THE AIR.[1]

THE time is ripe for an authoritative review of the laws, so far as they exist, governing aerial navigation and transport, and this work, representing a series of Tagore Law Lectures delivered by the author at Calcutta University, goes much farther than any other contribution to this branch of modern jurisprudence. It is somewhat strange that hitherto it has been left to French and other European commentators to deal systematically with the legal problems arising out of this new development in human activity. Credit must be given, however, to the International Law Association for grappling with the problem years before the International Air Convention of 1919, and for producing after years of labour a code of international air law, which is still available for the moment when the International Air Commission thinks fit to consider juridical questions, with a view to the adoption of international conventions. The Comité Juridique has also done valuable work in this sphere, and if Dr. McNair does not allude to either one or the other, it is probably because he endeavoured to make of his lectures a practical statement of the law as it is in England, rather than as it should be internationally—a very wise limitation. In an address to the Grotius Society eleven years ago I envisaged some of the legal problems which must develop through the rapid strides in aerial navigation, and urged that here was an opportunity of creating a *corpus juris* which might be free from the conflicts that were found in existing branches of jurisprudence. Dr. McNair, as already suggested, touches only lightly on what differences may have arisen in the aerial navigation laws of various countries, but he deals very comprehensively with the subject from the point of view of English law, so far as it may be considered to exist in the absence of judicial precedents. His chapters on jurisdiction, trespass, sovereignty and use of the air, liability of aircraft owners and pilots, contracts of carriage by aircraft, and charter parties will afford valuable guidance to lawyers engaged in disputes arising from aerial transport, and although so far there has been no decided cases in the Admiralty Court the moment cannot be far distant when air cases will be of frequent occurrence in that jurisdiction. A case like *Pashley* v. *British and Colonial Aeroplane Company, Ltd.*, concerning a collision between aircraft which was heard in the King's Bench in 1913 would now be tried by an admiralty judge. Dr. McNair expresses some doubt on this question of jurisdiction (Chapter V). He thinks the Admiralty Court would have jurisdiction in (1) the case of collision damage done to an aircraft by a ship upon water over which an admiralty court would have jurisdiction in the case of a collision between ship and ship; (2) *vice versa*; (3) collision damage between aircraft in the same circumstances; but where an aircraft damages something, like a pier or a bridge, adjoining water, he declares for a common law court. But I should have thought that the intention of s. 14 (2) of the Air Navigation Act, 1920, was that the Admiralty Court should have the same jurisdiction as to aircraft as to shipping, and that accidents arising in the air, though ending on land or in water, would confer such jurisdiction. So far as I know, no specific Order in Council, as was suggested in the subsection, has yet prescribed what tribunal should deal with various classes of litigation arising out of aerial navigation. The Order, S.R. & O., 1921, No. 1286, concerning Wreck and Salvage hardly touches this question, which will at no distant date have to be decided by the High Court itself, in the absence of such Order.

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[1] *The Law of the Air* (Tagore Law Lectures of 1931). By Arnold D. McNair, C.B.E., LL.D., Barrister-at-Law. (London : Butterworth & Co., Ltd.). Pp. xv + 249. Price 12*s.* 6*d.*

During the discussion on the Grotius Society paper referred to above, Mr. Manisty, K.C., asked: if a murder were committed in an aircraft, and the murderer landed in England, could he be tried here? Dr. McNair (at p. 93), in effect, gives the reply. The murderer could be indicted, whatever his nationality, if it happened in a British aircraft, under s. 14 (1) of the Act of 1920, or if it happened in a foreign aircraft flying over British territory, or territorial waters. It may be inferred, however, that if the crime were committed in a foreign aircraft while flying over foreign territory or the high seas it would be a matter of extradition.

Many other possibilities are lucidly and learnedly considered by the author in a volume which deserves to take its place as a textbook on the subject of aviation in all law libraries.

William Latey.

## POLICING THE AIR.[1]

Dr. Spaight, well known for his works upon the air, has written a book which will hold considerable interest for those who have realized the importance of the Disarmament and League of Nations movements, and the connexion between them. The rapidity of the development and improvement of aircraft is obvious ; many realize that the institution of an international police force controlled by the League of Nations is now within the bounds of possibility, and that the Air Force, as the most potent of military arms in the future, will be the best instrument.

The author deals with the major political and economic possibilities and problems which the institution of an International Air Force would entail ; he discusses previous suggestions of statesmen and publicists, touches upon League and Disarmament Conferences, and upon the question of commitments by League States which would arise if the organization which he predicts comes to pass. Dr. Spaight's description of an ideal International Air Force at work in the future if two countries go to war, and the imaginary conversation between two people dealing with the merits and dangers of the system, will give the reader much food for thought. His conclusion is that " anything in the nature of a standing force is impossible " except in the remote future.

W. L.

## JURISPRUDENCE.[2]

Dr. Hibbert's work on Jurisprudence is the result of over thirty years' teaching of the subject on Austinian lines. It is interesting to note that it appears exactly a century after Austin ceased lecturing on the subject. Dr. Hibbert admits to being an Austinian, though not a rabid one. Few teachers can, perhaps, claim to have exercised so great an influence on a subject over a century as Austin has done, and Dr. Hibbert's work is a testimonial to that influence. To a considerable extent, he proceeds by a method of correlating the views of Austin, Holland and Salmond on the various topics.

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[1] *An International Air Force*. By Dr. J. M. Spaight, C.B.E. (London : Gale & Polden). Pp. vi + 115. Price 5*s*.

[2] By W. Nembhard Hibbert, LL.D. (Lond.). (London : Sweet & Maxwell, Ltd., 1932.) Pp. vii + 332. 12*s*. 6*d*. net.

It goes almost without saying that Dr. Hibbert's exposition is lucid; in fact, it is difficult to think of any recent work on the same subject which " puts over " an author's ideas with such clarity and which must have succeeded in leaving a student with so little doubt of what the teacher was trying to say. From this point of view, the work is an excellent textbook, and probably the author meant it to be little more. This appears from the uses he allows to the subject, that it equips the student for the study of an actual legal system and that it is the best sort of training in logic for a lawyer, and from his view that it should be undertaken before approaching the student's own system. From this view it is permissible to dissent. It seems a mistake to believe that the logic of law can be dissociated from its philosophy, or to let the student be oblivious to the fact that Austinianism rests on a particular theory of legal philosophy, and that theory neither the most modern nor the most plausible. If this is so, it follows that the proper place for its study is rather when the student is completing his course than when he is unable to weigh theories and criticize conceptions in the light of practical knowledge.

Dr. Hibbert prefers the test of enforcement to that of " setting " the law, which Austin fixed on as the distinguishing mark of positive law. The element of command is therefore in his view of little importance. He adds to the already long list of words for describing the subject by choosing that of " national law." This leads to his rejecting International Law from his scheme altogether. It would appear, however, to be open to the objection from the Austinian point of view that it makes for confusion between the nation and the State.

As regards the sources of law, his view seems to be that until the Parliament Act, 1911, precedent was a source of law in England, because the decisions of the Judicial House of Lords could not be altered by legislation without the consent of the House of Lords, as a branch of the legislature. This is, surely, doing violence to the facts in order to shore up the theory of Sovereignty. Historically, the evolution of precedent had little to do with the House of Lords, and the Parliament Act made no difference to the position of precedent either in theory or practice.

The theory propounded accepts Austin's distinction of absolute and relative duties. As regards duties, Dr. Hibbert boldly carries the meaning of duty to its logical conclusion in defining it as " a liability to a legal sanction," and " owing a duty " as being subject to someone's decision whether disobedience shall be redressed or not. It would seem better to distinguish between the different meanings of the ambiguous term "legal duty." This being so, it is undesirable that law should make any use of phrases with such a different connotation from their normal one. It is, however, in dealing with rights that some English analytical jurists seem most distant from true analysis. To aim at setting forth the opinions of writers on Analytical Jurisprudence, and yet to make no reference to the vital variations of rights, such as powers and privileges, conceptions which have undermined the adequacy of the idea of relative rights, and have been developed with such care and acuteness, particularly by American writers, is to give the subject an appearance of simplicity which it does not possess and to deprive the student of necessary ideas.

In the enumeration of the various rights, no writer can do otherwise than analyse with his own system in view. Dr. Hibbert's analysis of English law is penetrating and his use of Roman law skilful. He is of those who hold that unless a right has a person or a thing as a subject-matter, it is without a subject, and he thus produces a neat division of rights *in rem*, but is compelled to bring together such diverse rights as rights to reputation, patent rights and the right to an inheritance in a sort of omnibus group.

If a general criticism is permissible, it would be that learning is subordinated to simplification. It is perhaps unfortunate that we have produced two such satisfying writers as Holland and Salmond. With them Dr. Hibbert fences willingly. But even in a student's textbook we expect to find, at least in the bibliography, some reference to Vinogradoff or to C. K. Allen's *Law in the Making*, to take but two examples—even if we must not expect to be told of the work which has been done on the subject in America and on the Continent. Nor is the historical school treated much better. Maine's function as introducing it to English readers should not be allowed to let students think that the school has stood still since he wrote, or to disguise the fact that his philosophy is fundamentally based on evolutionary theories while the school of Austin implies utilitarianism.

S. G. K.

## THE VICTIMS OF FRAUD.[1]

THIS book is a remarkable contribution to legal literature. It is a strong and forcibly expressed plea for a bold legislative reform. Until the millennium is reached, circumstances will always arise wherein it is necessary for one of two innocent parties to suffer for the fraud of a third. The learned author delivers himself of a scathing indictment of the present state of affairs, for very often the loss falls on the careful rather than on the careless party. For this result he blames the mentality which regards the wisdom of our ancestors as being sufficient for the solution of problems which belong to the present day. The law makes a fetish of title, and hence it happens that, in a contest between two innocent parties, one or the other is unduly favoured, irrespective of the question of his conduct. The law of conversion unduly favours the owner of goods, while the Bills of Exchange Act, 1882, unduly favours the transferee of a negotiable instrument. He concedes that in some cases the doctrine of estoppel intervenes to prevent injustice, but claims that its operation is fitful and uncertain. His proposal for reform is very far-reaching, and yet is very simple. He would in all cases test the rights of the parties by examining their relative diligence. This examination should be conducted, not by a jury, but by a single judge, assisted, if the parties desire it, by an assessor experienced in the practice of several trades, selected from a panel of persons kept up by the London Chamber of Commerce. He has, very rightly, a great fear of allowing the law to be determined by the usages of a particular trade, for he points out that it is impossible to be sure that any usage is really universal, and, moreover, even could this be assured, it would be very dangerous to allow, *e.g.*, the banking community to fashion the laws of banking. The appendix consists of the full text of his proposed Bill, which contains provisions that will at first cause surprise to the learned reader until a cogitation of the arguments in the book convinces him of their necessity. A bonfire is to be made of many old rules, both statutory and judiciary, and included in the holocaust are the Factors Act, 1889, the doctrine of market overt and the protection given by ss. 29, 30, 38 and 90 of the Bills of Exchange Act, 1882, to a "holder in due course." But, above all, the learned author wishes to get rid of s. 90 of the Bills of Exchange Act. Diligence, not honesty alone, should be required of a transferee of a negotiable instrument in order to entitle him to the protection of the law. One is somewhat tempted to wonder whether the goal aimed at might not be obtained by another road, namely, by applying to commercial transactions, and to the law of conversion generally, the equitable doctrine of constructive notice. But this is a big question, and should be discussed in a reasoned reply to the book, rather than in a review. The learned author has shed a pitiless light on some very dark places in the law, and has suggested a practical and sensible method of dispersing the darkness. His remarks should command the serious attention of all lawyers, all commercial men and, it is to be hoped, eventually of a majority of both Houses of Parliament.

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[1] *The Victims of Fraud*. By Eustace J. Harvey. (London: Humphrey Milford, Oxford University Press.) Pp. xxx + 304. Price 24*s*.

H. G. H.

## THE COMPANY OF SCOTLAND.[1]

FROM Scotland have proceeded more effective colonizers than from any other part of the British Isles. As a general rule their enterprises have been extraordinarily successful. Dr. Insh, however, has to tell the story of the Company of Scotland founded in 1693 and dissolved in 1707 which does not seem to have left any permanent settlement. The Company operated in Africa and the Indies, and came to be known, though not by contemporaries, as the Darien Company owing to its associations with the Isthmus.

Dr. Insh is already well known for his research in Scottish colonial history, and this latest addition maintains a standard of careful scholar-ship besides possessing a pleasant turn of phraseology and appreciation of a good narrative which make attractive reading.

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[1] *The Company of Scotland trading to Africa and the Indies.* By George Pratt Insh, M.A., D.Litt. (London: Scribner & Sons.) Pp. 343. Price 12*s.* 6*d.* net.

The description of the tragedy of the *Worcester* culminating in the trial of Captain Green and his crew provides a striking example of the way in which in former days the administration of justice could be influenced by popular clamour. It is clear that as his execution drew near even the nationalistic mob began to realize that there was inadequate evidence to justify his sentence, but his death was necessary to appease their wounded feelings at the lack of success of the Company's enterprises. The judges were powerless, though only the chief of those condemned actually suffered and the remainder were allowed to go free when the injustice had been realized by the populace.

The affairs of the Company were finally settled by the Act of Union, so that it has a place in the legal history of Great Britain and by its constitution and influence upon problems overseas may even claim a place in the legal history of the Empire.

## INTERNATIONAL PEACE.[1]

In August 1931 Sir John Fischer Williams, K.C., delivered three lectures under the auspices of Professor Zimmern at the Geneva School of International Studies, and he has performed a useful service in publishing their substance in a more permanent form. In them he seeks to reconcile the need of modern man for change, growth and development in international relationships with the equally urgent need for the avoidance of war. His argument is largely directed to negative the two old-fashioned ideas that national development necessarily involves international wars and that international settlements are ever permanent settlements. For these he would substitute two modern concepts: on the one hand that of world interdependence, without a proper recognition of which peaceful and orderly change is difficult, if not impossible; and on the other that of elasticity in treaty relations, so that in every case further developments may be adequately provided for, because, as he truly remarks, the rigid framework is bound in the end to collapse and collapse violently. This philosophy runs through his discussions on international peace and international change, methods of settling justiciable disputes and peaceful change in the past, theoretical constructions and the possibility of a "world state." Possibly one of the most stimulating features of this work is the author's review, necessarily brief though it be, of some recent efforts for solution of problems of international change to be found in such instances as Art. 19 of the Covenant of the League of Nations, the Geneva Protocol of 1924, the Pact of Locarno, the General Act for the Pacific Settlement of International Disputes and the Briand-Kellog Pact.

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[1] *International Change and International Peace.* By Sir John Fischer Williams, C.B.E., K.C. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 79. Price 3*s*. 6*d*. net.

The learned author adumbrates historical facts and arguments which lead him to the view that the reconciliation which he, and indeed all men of goodwill, seek will not be accomplished, on the analogy of the modern state as we know it, by referring all international disputes to a court of law. He would rely upon the faithful observance of treaties coupled with a recognition of possibilities for necessary, but only necessary, efforts for their peaceful modification as occasion requires. But who is to decide this? The author leans against an international legislative body with compulsory force as at the present time not a possibility, and probably not desirable, and expresses the view that we must work with the institutions which we have got, particularly the League of Nations and the organization the germ of which is to be found in the Pact of Paris.

In seventy-six pages the author has added a useful and stimulating postscript to his earlier work on international law and the League of Nations.

HECTOR HUGHES.

## AMERICAN FAMILY LAWS.

THIS is the second volume [1] of the important and valuable compilation (of which the first volume was noticed in the previous number of this *Journal* [2]). The general scope of the work is sufficiently outlined in the title. As it is further stated in the preface, the plan of the book is:

> wherever possible to do four things: (1) to make a brief summary of the common law; (2) to state the statutory law, first in summary form, second in detail, showing variations, resemblances, and omissions; (3) add such comment and criticism as seems pertinent; (4) collect under each head a selected list of references, including texts, case-books, annotations, reports, articles and case-notes from law magazines. Wherever it seemed helpful, comparative tables have been used, and wherever possible, the key words of the Statute have been used. The work partakes, therefore, somewhat of the nature of a commentary, a digest, an annotation and a work of reference.

The contents—which are set out in eighty-seven sections, divided into three parts, treating respectively of "Absolute Divorce," "Limited Divorce" and "Separation"—are of great interest from the standpoint of comparative law. Perhaps the most interesting general feature of the subject consists in the fact that whereas the statute law of the jurisdictions reviewed is in general extremely incomplete, in the absence of statutory provision it is the common law—including, in some jurisdictions, the English ecclesiastical law—which governs. This is particularly noticeable in such topics as those of the *effects* of divorce, judicial separation and desertion. It should be explained, by the way, that the term "limited divorce" is used in this work in a sense which appears to correspond to our "judicial separation," while "separation" refers to desertion and separation by consent.

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[1] *American Family Laws.* A Comparative Study of the Family Law of the Forty-eight American States, Alaska, the District of Columbia, and Hawaii (to January 1, 1931): Vol. II. (*Divorce and Separation*), by Chester G. Vernier, assisted by Benjamin C. Duniway. (Stanford University Press; London: Humphrey Milford.) Pp. xxvii + 523. Price 29*s*.

[2] *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, p. 303.

It is, of course, impossible in a review to give any sort of summary of what is itself a compendium of a vast body of law. But a few points may be selected for notice.

South Carolina is the only State which does not allow "absolute" divorce on any grounds. Of the remaining fifty jurisdictions there is agreement upon one cause only, namely adultery; but if all causes having statutory recognition in any jurisdiction are counted, they amount to thirty-nine, of which about one-fourth, however, are causes which must exist *ab initio*, so that in these cases divorce procedure is used as a substitute for annulment. No State recognizes incompatibility of temper as a cause of divorce. Divorce by mere consent of the parties is nowhere admitted; but seven States admit divorce where the parties have lived apart (even voluntarily) for a fixed period. Forty jurisdictions admit intoxication and six admit the drug habit as a cause.

Forty-five jurisdictions have one or more provisions in their constitutions relating to divorce. In forty, special divorce laws ("private acts") are prohibited. Only twenty-one jurisdictions have any officer resembling the King's proctor; and the editors comment that "it is a well-known fact that many persons obtain divorce under our present laws by collusion and perjury," and that "it is believed that this evil could be more effectively combated by the adoption of the divorce proctor system."

Forty-three jurisdictions allow divorce for imprisonment for, or conviction of, crime. Six, by express words, include conviction or imprisonment in a foreign country; but of these two, namely Vermont and Delaware, somewhat quaintly confine this interpretation to foreign countries having trial by jury. In Minnesota and in Washington there is statutory provision for the annulment by divorce of testamentary provisions by either spouse in favour of the other.

It is recorded that three States have made "rather startling changes" in their divorce laws since January 1, 1931, the date up to which this compilation purports to extend. "In 1931 three States engaged in a race to obtain the divorce business of persons beyond their borders. As Kansas and Idaho cut their required period of residence to ninety days to meet the law requirements of Nevada, Nevada promptly met the challenge by reducing the residence period to six weeks."

M. S. A.

## ENGLISH LAW OF MARRIAGE.

THE anomalies of the present English law of marriage have already been the subject of destructive criticism by a host of writers, and Mr. Worsley-Boden's carefully drawn indictment [1] adds but little to the substance of the charges which have previously been made. Where he differs from most of his predecessors is in the restrained and scholarly exposition of his case.

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[1] *Mischiefs of the Marriage Law*, by J. F. Worsley-Boden. (London: Williams and Norgate.) Pp. 427. 1932. 21*s*.

The first 150 pages are chiefly historical, tracing the legal history of marriage from the early Jewish and Roman law down to the most recent English statutes. In appendixes we have a brief survey of modern comparative law and a few pages devoted to prehistoric marriage. But the central and most valuable part of the book is occupied with a minute analysis of the present situation in England and the author's own views upon the problem of reform. His analysis of the existing system rests upon an exact knowledge both of the law and of its administration in practice. His proposals for amendment cannot easily be summarized, but they go considerably beyond the proposals put forward by the majority report of the Royal Commission in 1912 and also beyond those contained in the Bill which Lord Buckmaster introduced in 1920. It goes without saying that they contain abundant matter for controversy. But they are at least consistent in themselves, and the English law as it stands cannot be defended from any point of view, whether Christian or non-Christian.

H. A. S.

## RUMANIA.[1]

THIS book might almost be described as a heroic attempt, for it tries to destroy the effect of the extraordinarily able and variegated flood of propaganda directed against Rumania from multitudes of mutually hostile sources. Its author has taken the trouble to study the propaganda literature itself and make a very sympathetic and skilful use of it and of other sources of reliable information. The one misfortune is that, being a Czech by race, although a Professor in an American college, he did not get some Anglo-Saxon colleague to correct his English, for he is at times indistinct and difficult to follow. Further his exclusion of Rumanian, Czech and all other Slavonic texts from his bibliography is unfortunate, although based on quite respectable grounds. He has in any case to cite such works extensively in his text.

His main subject is the economic and political situation of the country, depicted on a very skilfully marshalled historical background.

From p. 217 he begins a survey of the constitution and administration, in which he sets forth the position of the law from the period of the reunion of the principalities to the present day.

The idea is corrected by the earlier chronology, but it is well to emphasize that this part of the book only deals with the constitution of the kingdom (*Regat*) and of the great Rumania as restored by the Great War. No reference is made at all to the extraordinarily interesting previous history of the constitution in the separate principalities and territories, apart from some casual references in the first section of the book.

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[1] *Contemporary Rumania and Her Problems. A Study in Modern Nationalism.* By Joseph S. Roucek. (Stanford University Press, Stanford University, California; London: Humphrey Milford, Oxford University Press, 1932.) Pp. xxv + 422. Price 22*s*. 6*d*. net.

The author's remarks on the difficulties of the problem are true and just, and set out admirably on pp. 217 ff., and a personal acquaintance with the country reinforces their truth.

But it is a mistake to speak as if the Rumanians were experimenting *in vacuo* and had no previous history and no models. The fact that they chose Belgium as the first model to imitate is significant in a way not shown in the book. We know what an influence the French Revolution of July 1830 and the subsequent one of 1848 had on the whole of Europe. It is well to recall here that there was an organic relation between the July revolution in France, the Polish rising of 1830 and the Belgian rising of 1830. Belgium succeeded in establishing her national entity and adopted a constitution influenced alike by her own peculiar past and by French example.

Now Belgium was the only smaller Western power with a close kinship to France and a definitely Latin culture free from subservience to the two things in the West that seemed dangerous to the Rumanians, the Roman Church and the Turcophile powers. It was, therefore, inevitable on this ground alone that the Rumanians should take the framework of their constitution from Belgium. Further the mixed population of Belgium offered an additional reason, for the union of the two principalities to form the *Regat* was the conscious act of a nation eager to include its whole people in their own single State, and prepared to take in and treat fairly those alien elements with which history had associated them.

Anyone seriously interested should add to the admirable details of Chapter X, and of certain other paragraphs, a study of the efforts at constitution-making and code-making of the Phanariote rulers, whom modern Rumanians are not inclined to dismiss so airily as our author. Here we find them—and some of their seventeenth-century predecessors—turning to modernized versions of Roman law and to the theoretic constructions of great Western jurists and political theorists. The use of the Justinian Code by a Phanariote Greek is really a most startling recognition of the character of the people and of their right to share with the Greeks of Hellas the term Romaioi, Romani.

As to other examples and models in neighbouring States, note the efforts of Serbia to form a compact code and a solid constitution long before 1830 and the code of Danilo and earlier efforts in Montenegro.

A great collection of ancient constitutional and general legislation of the past was published in the years of the peasant crisis by the government, and this is of abundant interest, for it shows the steps by which Rumania recovered her status as a successor State of the Roman Empire and prepared for her own resurrection as a unitary State.

LEONARD C. WHARTON.

## INTERNATIONAL ADJUDICATIONS.[1]

THE first two volumes of Mr. Moore's great collection of international arbitrations have already been noticed in an earlier number of this *Journal*.[2] The third volume records the activities of the Commission appointed under the "Jay Treaty" of 1794 to settle the claims of individual British subjects in the United States. This story forms an unhappy chapter in the history of arbitration. By the terms of the treaty the four commissioners appointed by the treaty were to choose their chairman by lot, and the lot fell upon a British subject, so that there was a British majority upon the board. Almost from the beginning differences of principle appeared in the discussions of the commissioners, and these differences followed national lines. In the summer of 1799 the American commissioners finally withdrew, and the commission broke up. After prolonged negotiations between the two governments the scheme of arbitration was abandoned, and by a convention signed in 1802 it was agreed that Great Britain should accept the payment of a lump sum of £600,000 by the United States in full settlement of the claims of British subjects.

As in the two earlier volumes the documentation of the controversy is given in the most elaborate detail.

The fourth volume is of more general interest, for it deals with the mutual claims presented by Great Britain and the United States arising out of violations of neutral rights and neglect of neutral duties. These claims were heard by an arbitral commission constituted under Art. 7 of the Jay Treaty. As has frequently been pointed out, the policy adopted by the United States during the wars of the French Revolution is really the starting-point of the modern law of neutrality, and the cases submitted to the commission involved principles of the first importance. Among them we find such fundamental problems as the question whether food is contraband, and the French claim to exercise belligerent jurisdiction in neutral territory. Unfortunately disputes between the commissioners again led to a disruption of the board, but proceedings were resumed in 1803 as the result of a new convention between the governments.

Both volumes contain much matter that is of the first importance to all students of the history of arbitration, and Vol. IV is also valuable for the light which it throws upon the early history of the law of neutrality.

H. A. S.

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[1] *International Adjudications, Ancient and Modern.* Vols. III and IV. Edited by J. B. Moore. (London: Humphrey Milford, Oxford University Press, 1931.) Pp. xxviii + 564 and xxvi + 600. Price 12*s.* 6*d.*

[2] Third Series, vol. xiv, pt. i, p. 150.

## TAXATION.[1]

THE League of Nations has issued a summary of the fiscal laws of France, Germany, Spain, the United Kingdom and the United States, particularly as they affect resident foreigners and nationals deriving income or profits from abroad. It has been compiled by officials of the various fiscal administrations concerned, the sections relating to English law being contributed by Mr. E. W. Verity of the Board of Inland Revenue. The result is to place in the hands of business men and their legal advisers a reliable summary of the laws relating to double taxation, though it will not dispense with the need for more specialized assistance in dealing with particular problems. The work should also be of service to those who have to deal with the task of negotiating international conventions upon this difficult subject.

A smaller book, forming one of the " Foreign Law Series " edited by M. Lapie of the Paris Bar with the aid of numerous foreign collaborators, presents in a highly summarized form the legislation of Holland, Switzerland, Spain and Poland relating to the taxation of foreign companies. The foreign merchant or lawyer will undoubtedly find such books useful in enabling him to obtain a general idea of the legal situation in any given country, though they will not relieve him from the necessity for obtaining expert advice in the solution of particular problems.

H. A. S.

## THE BOOK OF ENGLISH LAW.[2]

ALTHOUGH Professor Jenks's admirable survey of English law was only published in 1928, it is satisfactory to find that a third edition is already required, and in the meantime an edition has been published in Spanish. It is not necessary to add to the appreciative review by Professor Lévy-Ullmann (*Journal*, Third Series, vol. xi, p. 148) except to express regret that it has not been found possible to publish an edition in French. The work is one which deserves an increasingly wide circulation, and is particularly valuable for educational institutions throughout the Empire.

## SURVEY OF ENGLISH LAW.[3]

THE survey of English Law which, since the year 1928, has been published annually by the Department of Law and International Studies of the

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[1] *Taxation of Foreign and National Enterprises.* (Geneva : League of Nations. London : Allen & Unwin.) 1932. Pp. 275. Price 10*s.*

*Taxation, as it affects the Doing of Business Abroad in Holland, Switzerland, Spain and Poland.* (Paris : Librairie Sirey. London : Sweet & Maxwell, 1931.) Pp. 119. Price 5*s.* 6*d.*

[2] *The Book of English Law* (as at the end of the year 1931), by Edward Jenks, D.C.L. (London : John Murray, 12*s.* net.)

[3] *Annual Survey of English Law,* 1931. (London : London School of Economics, 1932). Pp. lvi + 381.

London School of Economics has taken its place as one of the most useful and compendious of our annual publications. The volume for 1931 maintains the high standard of the earlier issues. Not the least interesting feature of it is the introductory general survey, which briefly and informatively outlines to some extent the relation of the legislation of the year to the national, Imperial and Commonwealth conditions from which it flowed. For instance, to mention but a few examples, the industrial depression is reflected in the Unemployment Insurance Acts; Empire and Commonwealth developments are indicated by the Statute of Westminster, and the new Constitution of Ceylon; Family Law touches problems of alimony and maintenance; and specialized branches of law such as that relating to Property and Conveyancing, Contracts, Torts, Mercantile matters and Crime all have their place in this volume, which is really a year's legal history conveniently considered in each branch under the heads of legislation, case law and literature.

The Tables of Cases, Statutes, Books and the adequate index make readily accessible the wealth of information which is here collected so usefully.

HECTOR HUGHES.

## CASES ON EQUITY.[1]

THIS collection of cases by two professors of law in Dalhousie University, Halifax, N.S., will be welcome not only to Canadian law students but to all who are interested in seeing illustrations of the application in Canada of English rules of equity.

The Province of Quebec, of course, with its French civil law system stands apart from the other provinces. The Canadian Bar Association has done a service to legal education in Canada by helping to bring about a standard curriculum in the law schools of the provinces, whose law is based on that of England. This volume is designed primarily for students taking one of these prescribed courses. It does not cover the whole field of equity, because trusts, wills and some other matters are dealt with in other courses.

## AMERICAN CONSTITUTIONS.

THE new volume[2] on American constitutions published by the well-known constitutional lawyer, M. Mirkine-Guetzévitch, is prepared on lines similar to his book on the post-war constitutions of Europe. A second part of the volume contains the texts—amendments included—of the constitutions of twenty-two American countries, all but Newfoundland. Constitutions of provinces and member-States could not be reproduced, for evident reasons, in one single volume. The texts are very much up-to-date, and one has to mention the case of Brazil, where the decree of the Provisional Government of November 11, 1930, dealing with constitutional matters, is being reproduced beside the constitution of 1891 and its subsequent modifications.

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[1] *A Selection of Cases on Equity.* By Sidney Earle Smith and Horace Emerson Read. (Toronto: Burroughs & Co., 1931.) Pp. 685.

[2] *Les Constitutions des Nations Américaines.* By B. Mirkine-Guetzévitch. (Paris: Delagrave, 1932.) Pp. 147 + 486.

The extreme usefulness of such a collection of constitutional texts for research as well as for ordinary didactic work cannot be doubted, and anybody interested in public law should be grateful to our author for making available all the main texts to every student. It may be hoped that these collections will be still further completed, so as to include the pre-war constitutions of Europe, as well as the constitutions of Asia, Africa and Australia. We hope, by the way, that a second edition of the American constitutions will soon follow, which will give us the texts on which the constitutional order of Newfoundland is based.

The " synthetic essay " of 147 pages, by which the volume starts, is a very interesting monograph on American constitutions and constitutional life. It is not meant to be a history of American constitutions, nor does it pretend to be a treatise on American constitutional law, but gives us, in separate chapters, some of the most interesting and characteristic aspects of the public law of the New World. These chapters deal, respectively, with: Influence of France and of the United States (on Latin America), the United States (a very short résumé of its federal organization), the presidential régime in the United States, the Constitutions of Latin America (short résumé), Presidents and dictators, Elections in the United States, Presidential re-election in Latin America, the judicial veto, the federative problem, texts and political realities.

Among all these problems, one must especially mention the chapter dealing with elections in the United States, which contains an analysis of the people's participation in political life and struggle, and the most interesting chapters concerning Latin-American constitutionalism. The semi-dictatorial character given to the President by most constitutional texts in America creates conditions very favourable to transgressing the remaining legal limits of his powers and creating a full-blooded dictatorship. The American institution of a legally powerful President, mitigated in the United States by national character and political tradition, is, in Latin America, one of the causes of frequent revolutions.

B. A.

## FOREIGN LEGAL SYSTEMS.

THE second volume [1] of the series of which the first on the law of Belgium was reviewed in our February number [2] deals with Czechoslovakia. The plan is excellent. These general descriptions of the different legal systems by local experts in the several branches of law will help considerably to dispel the prevailing ignorance of foreign laws. We venture, however, to put in a plea for more bibliographical information, particularly desirable as to Czechoslovakia of which the legal literature is little known abroad. The special interest of its legal system lies in its composite character. New laws, breathing a very modern spirit, have been grafted on the old stocks of Austrian law and Hungarian law respectively.

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[1] *La Vie Juridique des Peuples.* No. 2, *Tchécoslovaquie.* (Paris, Delagrave, 1932.) Pp. 468.

[2] Third Series, vol. xiv, pt. i, p. 157.

At present there is no unified system of private law for the whole territory, though a draft code has been prepared. In the family law and in the law of succession there are considerable differences between the Austrian law of Bohemia and Moravia and the old customary law of Slovakia and Ruthenia.

The third of the series [1] is certain of a wide sale throughout the world. It is, in fact, difficult to imagine how a better presentation could be given, within the limits of a book of 500 pages, of the legal situation of France. M. Lévy-Ullmann and M. Mirkine-Guetzévitch have been able to find collaborators each of whom is an eminent specialist, and the outlines of every branch of the law are clearly and firmly traced. The names of the contributors are a sufficient guarantee.

Besides the civil law in the narrow sense, there are sections on constitutional law, finance, administration (including remedies against the State), penal law, commercial law, copyright, etc., labour laws, civil procedure, international law, public and private, and the organization of the French Colonial Empire.

In their preface the learned editors very properly draw attention to the popular illusion as to codification. It is often supposed that codification inevitably produces rigidity and impedes the free growth of the law. The history of French law during the last century completely disproves this. By applying to the codes methods of interpretation very different from those which English courts apply to statutes, French judges have demonstrated that their law possesses all the elasticity required to make it fit the needs of a new age. English and American lawyers find it difficult to realize that judge-made law is just as important in France as in the common law countries. It is true, all the same, though Napoleon and his codifiers were very far from anticipating such a result.

F. P. W.

## A YEAR'S LEGISLATION THROUGHOUT THE WORLD.[2]

THE Istituto in Rome receives the laws, decrees and official journals of a great number of countries.

In this handsome and well-printed volume the Secretary-General, Professor Salvatore Galgano, gives the titles of all laws of any general interest, taken from 117 countries, the laws being arranged under subject-headings, with a reference to the place where the text may be found. It will be a valuable aid to lawyers who are concerned with foreign matters.

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[1] *La Vie Juridique des Peuples—France.* Sous la direction de H. Lévy-Ullmann et B. Mirkine-Guetzévitch. (Paris: Delagrave.) Pp. 488. Price 30 frs.

[2] *Repertorio della Legislazione Mondiale, Anno* 1932, *A Cura di* Professor Salvatore Galgano, *Istituto di Studi Legislativi, Roma.* Pp. 409.

F. P. W.

We have also to acknowledge: [1]

*Great Britain and the Law of Nations.* Vol. I, States. By H. A. Smith. (London: P. S. King & Son, Ltd.) Pp. xvi + 416. Price 16*s.*

*International Servitudes in Law and Practice.* By Helen Dwight Reid. (London: Cambridge University Press.) Pp. xxii + 254. Price 16*s.* 6*d.*

*The Cabinet Council of England in the Seventeenth and Eighteenth Centuries,* 1622–1784. Vol. II. By Edward Raymond Turner. (London: Humphrey Milford.) Pp. xix + 480. Price 47*s.*

*The Influence of the Commons on Early Legislation.* By Howard L. Gray. (London: Humphrey Milford.) Pp. xviii + 423. Price 22*s.* 6*d.*

*Annual Digest of Public International Law Cases.* Years 1919–1922. Ed. by Sir John Fischer Williams and H. Lauternacht. (London: Longmans, Green & Co., Ltd.) Pp. iv + 510. Price 45*s.*

*The People and the Constitution.* By Cecil S. Emden. (London: Humphrey Milford.) Pp. xi + 336. Price 15*s.*

*Principes de Droit international privé selon la Loi et la Jurisprudence françaises.* By E. Bartin. (Paris: Editions Domat-Montchrestien.) Pp. 522. Price Frs. 65.

*Zessionsrecht.* 1 Teil. *Rechtsvergleichung.* By Dr. Karl Arndt. (Berlin: Walter de Gruyter.) Pp. 174. Price R.M. 6.

*Staat und Selbstvorwaltung in England. Die Kommunalaufsicht der Zentralbehörden.* By Dr. Adolf Schüle. (Berlin: Carl Heymanns Verlag.) Pp. xix + 256. Price R.M. 12.30.

*Die rechtliche Organisation der Konzerne.* By Dr. Richard Rosendorff. (Berlin: Industrieverlag Spaethe & Linde.) Pp. 209. Price R.M. 5.60.

*Das neue deutsche Aktienrecht.* By Dr. Richard Rosendorff. (Berlin: Industrieverlag Spaethe & Linde.) Pp. 463. Price R.M. 13.

*Die Zivilgesetze der Gegenwart.* Bd. 1. *Frankreich Code Civil,* Part 2. (Mannheim: J. Bensheimer.) Pp. xx + 323–933. Price R.M. 50.

*Adatrechtbundels.* Vol. xxiv. Java en Madoera; Vol. xxv, Sumatra. (The Hague: Martinus Nijhoff.)

The following periodicals are also received; American Bar Association Journal; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Journal; Bulletin de la Société italienne pour les Etudes de Droit industriel ; Bulletin officiel du Congo Belge ; Bulletin statistique de la République Tchécoslovaque ; Calcutta Weekly Notes ; Chinese Social and Political Science Review ; L'Egypte Contemporaine ; Gold Coast Review ; Headway ; Hindustan Review ; International Labour Office Bulletin ; International Review of Agricultural Economics ; International Year Book of Agricultural Legislation ; Journal of the Parliaments of the Empire ; Juridical Review ; La Giustizia Penale ; La Procedura Penale Italiana ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; New York University Law Quarterly Review ; Revista de Ciencia Juridicas y Sociales ; Revista de Derecho Jurisprudentia ; Revista de Identificacion y Ciencias penales ; Revue Internationale de la Croix Rouge ; Social Sciences Quarterly ; Studi di Diritto Industriale ; University of Illinois Studies in the Social Sciences.

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[1] Mention here does not preclude a review later.

# MODERN LEGISLATION IN ARGENTINA AND CHILE.

[*Contributed by* GORDON IRELAND, ESQ., M.A., LL.B., *formerly Assistant Professor of Comparative Law, Harvard Law School.*]

THE only South American Republics, except small Paraguay and Uruguay, lying almost wholly in the Temperate Zone ; with practically no negro population, and only a few and remote surviving Indians ; the ridge of the Andes which forms the boundary between them for over two thousand miles being one of the few South American political divisions which has followed natural lines (the remaining disputed portion settled by arbitral award of King Edward VII in 1902) ; considered by Lord Bryce in 1910 as particularly homogeneous *bona fide* constitutional republics ; with large foreign investments, especially British from an early time and still increasing ; with a low record of internal disturbance, at peace with each other and all their neighbours, leaders in movements and policies of Latin-America, Argentina gradually improving the application of laws it enacted earlier in the century and Chile adopting advanced and modern theories both offer interesting material to the student of practical social legislation.

**Constitution.**—Both countries have federal constitutions, based originally on that of the United States of North America : a President, for a six-year term, ineligible to succeed himself (Chile has no permanent Vice-President) ; a Cabinet of eight Ministers ; a bicameral legislature, with the Senate changing in part only at each electoral period and money bills required to originate in the Chamber of Deputies ; prohibition of slavery and of torture ; equality (foreigners included) before the law ; freedom of education, belief, conscience and worship, and of speech, written or oral ; inviolability of property except for public use with prior compensation, of the person except after judgment of a competent court according to law previous to the crime, and of correspondence and the home ; and a federal court system of civil and criminal tribunals with, in appropriate cases, three instances (*i.e.* two appeals), culminating in a national supreme court. In Argentina (14 provinces, 10 territories, 1 Federal District) each province retains all powers not expressly delegated by the national Constitution to the Federal Government, and has its own Constitution, elected Governor and Legislature, codes and courts; but the Federal Government may (and formerly frequently did) intervene in the provinces "to guarantee the republican form of government." In Chile (16 provinces with 75 departments, 2 territories) each province is governed by an Intendente with the advice of an Assembly appointed by the Municipalities and each department (subdivision of a province) by a Governor, both appointed and removable by the President. The present Argentine Constitution was adopted September 25, 1860, and was amended September 12, 1866, as to national taxation and March 15, 1898, as to the number of Deputies and Cabinet Ministers: under it Gen. Hipólito Irigoyen took office October 12, 1928, for the six-year term to which he had been elected, and resigned September 6, 1930, after a revolutionary movement.[1] Gen. José F. Uriburu was Provisional President from September 8, 1930, to February 20, 1932, when, elections having been held, the successful candidate, Gen. Agustin P. Justo, was inaugurated, presumably for the rest of the constitutional term, until October 12, 1934. In Chile, the original Constitution of May 25, 1833, remained in force until September 18, 1925, when the present one was promulgated: after two brief incumbencies while it was getting started, Gen. Carlos Ibáñez del Campo went into office in 1926 and stayed until July 26, 1931, when he resigned after open opposition had developed; nine chief executives held office, some of them more or less according to the Constitution, in the next seventeen months; and, elections having been held October 30, 1932, Sr. Arturo Alessandri, who had been President in 1920–4 and March–October 1925, resigning both times, was inaugurated on December 24, 1932, for a six-year term. In both countries the general substantive law is embodied in a Civil Code,[2] a Code of Commerce and a Penal Code, implemented by Codes of Civil and of Criminal Procedure, both essentially Spanish in plan and permitting great technicality and unconscionable delay. Lawyers may practise after passing examinations, without regard to attendance, under accredited Faculties of Law for five or six years; and neither they nor the bench are subject to any effective professional discipline.

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[1] He died in Buenos Aires, July 3, 1933.

[2] Based on the Code Napoleon, but with many originalities, especially in Chile.

**Persons: Married Women.**—In Argentina, the status and rights of the married woman, as theretofore prescribed by the Civil Code, were materially amplified by Law 11,357 of September 22, 1926. An adult unmarried woman, single, divorced or widow, is given the same rights and civil powers as an adult man; and the adult married woman is given the right, without the necessity for marital or judicial permission, to practise any honest profession, industry or business and dispose freely of her earnings and investments therein, join civil or commercial societies or partnerships, administer and dispose of for value her own separate property, remain guardian of the person and property of her children by a former marriage, accept inheritance and gifts, act as administrator, executor or guardian, and sue or be sued in civil or criminal actions which affect her person or property. A married woman not yet of age has the same rights, except that to dispose of her property she needs her husband's consent, when he is of full age, or that of the court, if he refuses or is under age. In getting away from the old Spanish matrimonial régime of administration and practical beneficial ownership by the husband of the community goods, the Senate voted for absolute separation of property, more complete even than the separation recognized by the French Civil Code for those spouses who have stipulated for such régime in their ante-nuptial capitulations; but the Chamber of Deputies thought this would in certain cases, which they discussed, in fact work to the woman's detriment, and the provisions as enacted represent an inter-cameral compromise upon a limited separation to the woman of her own goods, and the right to have it extended, by order of court upon cause shown[1] over the ganancial property. Marriage in Argentina does not change the woman's nationality, but by the Constitution[2] foreigners enjoy all the civil rights of citizens. No woman in the nation has any political rights, and there is no divorce, though projects of a law to that end have been mentioned in Congress and even reached Committees.

In Chile the substitution of civil marriage, required to be registered before officials of the State, for the ecclesiastical form as the legally binding ceremony took place many years ago, and with it was introduced the more liberal matrimonial régime and the separation of property; and they have ever since taken the place of the original Spanish provisions in the Civil Code. The new Constitution of 1925, however, socially advanced in many respects and containing in parts some very noble propaganda, declares [1] that

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[1] Such as imprisonment of the husband for two years or more.

[2] Art. 20.

> The State will be inclined to a suitable division of property and the establishment of family ownership.

Opposing, minimizing or explaining much that seems to savour of socialism in this and other portions of the new Constitution, one law candidate suggests in his thesis [2]:

> Does this subdivision refer to all things susceptible of ownership or only to real property? When the reformer declared that the State would be inclined to such division, he unquestionably referred to all things useful to man, but in supporting the creation of family ownership undoubtedly his thought was directed toward imposing upon the State an obligation to take measures calculated to bestow upon every family a portion of land with the character of a family patrimony.

The division of the territory of the Republic into small holdings which the poor or lower-middle-class man might establish his home upon and hand down to his descendants was one of the "talking points" of the campaign for reform which preceded the Constitutional Convention, but the problem was never so acute in Chile as, for example, in Mexico; and notwithstanding the declarations of the Constitution, and the evidently honest efforts of the Government for a time to carry them out, few households of a sufficiently responsible type were found willing to move out on to the somewhat remote public lands where a beginning was made of division and settlement, a certain hostility developed to foreign immigration, and the colonization plans have made little progress latterly.[3] The matter of workmen's homes we shall consider under a subsequent head. The married woman is restricted in certain respects by her husband's will as to domicile and other matters fundamentally affecting the partnership; but she is no longer, as in the places where the strictest old law prevails (*e.g.* Paraguay) required to obtain his permission before travelling or leaving the country; so that this cause, at least, is here happily removed from the possible field of irritating international representations. Women in Chile have no political rights;[4] and there is no law permitting absolute divorce (but separation, simple or permanent, only), wherefore the Chilean women and lawyers between them, with ingenious inspiration from necessity and desire, permitted and assisted by the courts, have had great recourse to the Code provisions for annulment of marriage, which for all practical purposes seems to work exactly as well, and under Chilean law has substantially the same results, as to alimony, right to remarry and support and custody of the children, who remain in all respects legitimate regardless of the annulment. It requires a certain amount of "arrangement," however, to establish a *prima facie* ground upon which the court can make its decree, whether or not there is opposition. For example, the notice of intention must be filed and licence obtained in a civil registry of the district in which one or both of the parties reside: if then, two or three years after the celebration of the marriage, it turns out, from the affidavit of one of the spouses as to the former residence of both, that this preliminary requirement was not correctly complied with, the marriage may be annulled. The more advanced and anti-church party have from time to time demanded a real divorce law; and as recently as May 23, 1933, two days after the opening of the present regular session of Congress, the Radicals introduced a Bill to permit absolute divorce for cause or by mutual consent, creating thereby a great political turmoil, with allegations of breach of faith, realignment of coalitions and working agreements and a decision of the Conservatives to abstain for a time altogether from attendance upon the sessions. The Bill will probably not now be enacted, but if the present party majority continues for a few more administrations, a divorce law will undoubtedly come.

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[1] Art. 10, Subd. 14.

[2] *Reformas . . . de la Constitucion*, Pedro E. Gonzalez Garcia (Santiago, 1927), p. 188.

[3] See discussion in the President's Message to Congress, May 21, 1933.

[4] In Uruguay, alone in South America, is there woman suffrage, granted in 1921.

**Labour Laws.**—More than a score of years ago, Argentina created[1] a national Department of Labour, under the Minister of the Interior, and while its chief duty at first was the enforcement of existing laws as to the hours of labour, and the establishment and regulation of employment offices[2] it was three years later given charge of the operation of the Workmen's Accident Law[3] and the subsequent Decrees applying and modifying it.[4] Later laws have prohibited the manufacture, importation and sale of matches containing phosphorus[1] and regulated the currency and payment of wages,[2] the employment of women and minors[3] and night work in bakeries.[4] The laws and regulations concerning the retirement and pensions of civil employees of the State, and of the employees of railroads, other public service corporations and of banks are too numerous and have been modified too frequently to permit of their detailed relation here; and it need only be said, in general, that their terms have been so liberal to the employee, their requirements so little related to sound actuarial principles of insurance, and the State has borrowed so freely such money as has accumulated from the contributions of employers and employees, that all of the funds are substantially bankrupt; and one of the pressing administrative problems of the Government at the moment is the response to be given to the resolutions and complaints of the many organizations of disappointed and hungry pensioners. The Accident Law applies to workmen whose annual salary does not exceed $3,000 (Argentine currency) and indemnity is paid only if the incapacity lasts more than six working days; otherwise the law follows the usual model, in requiring from the employer a deposit or insurance in approved companies, full personnel books and detailed reports of all accidents, and establishing a scale for the valuation of injuries, classified as absolute or partial incapacity, and careful enumeration of those entitled to share in case of death. The law itself is national, but regulations under it are local, and may be, and in most cases have been, adopted individually, with some slight differences, by the several provinces. The law is said to be operating with reasonable satisfaction, though the larger employers, especially foreign corporations, are of course not wholly content with its provisions, and the insurance companies make great complaint from time to time of some of the awards. That the courts hold the balance as fairly as they can may be instanced from a recent decision[5] in which the judge denied indemnity in a hernia case until the injured man should consent to submit to the surgical operation offered him by the employer, saying:

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[1] Law 8,999, October 8, 1912; Regulations, January 2, 1913.

[2] Law 9,148, September 25, 1913; Law 9,661, August 28, 1915; Regulations, November 9, 1915; Law 11,570, September 25, 1929.

[3] Law 9,688, October 11, 1915; Federal Regulations, January 14, 1916.

[4] Department's representation of injured workmen and families, November 12, 1917; option to proceed under this law or the common (*i.e.* Civil Code) law, May 21, 1918; rights of minors, May 21, 1918; investment and payment of benefits, June 25, 1918; inclusion of accidents on agricultural tractors, September 18, 1923; depositaries of indemnities, May 6, 1925; authentication of books, July 5, 1927; inclusion of aeronautic industry accidents, September 29, 1927.

> The Accident Law has the same extent and purpose as workmen's insurance: to pay for something which has been lost and cannot be recovered; not a source of profit or gain, it is simply compensation.

International Conventions for reciprocity in the payment of accident indemnities have been signed with Spain,[1] Italy,[2] Austria[3] and Belgium.[4]

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[1] Law 11,127, June 8, 1921.

[2] Law 11,278, August 5, 1925.

[3] Law, 11,317, September 30, 1924.

[4] Law, 11,338, September 9, 1926.

[5] *Schaine* v. *Blue Star Line, Ltd.*, Federal, May 30, 1933.

Chile has had since 1924 laws concerning the Labour Contract,[5] Compulsory Insurance against Illness and Incapacity[6] and Workmen's Compensation;[7] the first and last of which, with twelve other less important laws and decrees relating to labour (including hours, maternity, conciliation), have been gathered into a single collection of "Labour Laws."[8] The Compulsory Insurance Law has been extended to agricultural labour[9] and the Fund has been put under the control of a largely autonomous Council.[10] In comparison with the Argentina decision mentioned above it may be noted in passing that in the Chilean law, hernias give no right to indemnity, but only to medical (surgical ?) attention.[11] An unusual and for its novelty probably the most interesting feature of the Chilean law is the institution of Labour Tribunals. These[12] are new courts with departmental jurisdiction established in such places as the President shall determine, their functions being entrusted to the Court of Record in the other departments, who decide all controversies relating to the Compulsory Insurance Law, the Labour Laws and to employment contracts, which include such matters, thus removed from the jurisdiction of the ordinary civil courts, as the rightfulness of the discharge of a workman for alleged cause and the amounts to be paid him on discharge by way of next accruing wages and indemnity for breach of the contract of employment. The court is composed of one judge, who need not be a lawyer, whose decisions are final and conclusive if the amount in controversy does not exceed $1,000 (Chilean), but may be taken to a Labour Court of Appeal of three judges of whom the President must be a lawyer, if over that sum is involved, and in such case the decision in second instance is final. Much abuse, amounting almost to scandal, has crept into the operation of these courts, to the great alleged injury of the employer class. In a recent instance,

[1] Law 11,125, August 8, 1921.

[2] Law 11,126, August 8, 1921.

[3] Law 11,633, September 28, 1932.

[4] Law 11,639, September 28, 1932.

[5] Law 4,053, September 29, 1924.

[6] Law 4,054, September 8, 1924; Regulations, April 9, 1925.

[7] Law 4,055, September 8, 1924; Regulations, March 31, 1925.

[8] Decree 178, Ministry of Social Welfare, May 13, 1931; old Regulations in force pending issuance of new, Decree 238, March 31, 1925, and Decree 345, May 28, 1925.

[9] Regulations, Advisory Council, April 9, 1930.

[10] Decree 203, July 14, 1932; Decree 499, August 26, 1932.

[11] Presidential Decree, August 27, 1927.

[12] Decree 2,100, December 31, 1927.

an award of a month's wages for the next term and nearly six times as much by way of indemnity for breach of the contract of employment was granted a workman who was discharged for being drunk and attacking with a knife his foreman, who knocked him down without injury, because, the judge said, the law only justified discharge after a "course of conduct" tending to show intractability or unsuitableness for the job, whereas the proof in the case showed only a single assault; a result which, as a newspaper which reported the decision with some bitter comment remarked, made it necessary for the employing company to let their foremen be assaulted several times before taking action. Protests grew to such strength that the Government had to take notice of them, and recently[1] the Labour Tribunals have been placed with all the other courts of the nation under the "directive, correctional (disciplinary ?) and economic superintendence" of the Supreme Court[2]; but that this alone can mean much in the way of actual improvement seems doubtful, for nothing indicates that a decision complained of is to be in any way suspended or modified by application to the Supreme Court, whose activity will apparently be limited at most to a reprimand to the judge who has been in error, and presumably only through a report to the Labour Court of Appeal or the Minister of Labour; at least in its previous exercise of this jurisdiction, the Supreme Court has only been authorized to reconvene a court below to punish by fine or otherwise an erring judge of first instance or in proper case itself to admonish or censure an Appeal Court, without effect upon the judgment in the cause. It will be interesting to observe if the general dissatisfaction and the information which it may obtain privately will lead the Supreme Court to attempt any more actively effective control of these Labour Tribunals.

**Finance.**—The world's economic troubles of the last three years have adjourned markets and abolished prices for all the things which South America exports, with the natural result, taken with existing national debts and balances, of depreciating her currency in the money exchanges of North America and Europe. Argentina and Chile, in common with most of the other Republics, have tried to protect themselves by drastic laws controlling foreign exchange, forbidding all remittances abroad of currency, drafts, cheques or other banking credits, and even in some cases return or export of unsaleable and unpaid-for merchandise except on petition to and permission by a central special all-powerful Board of Control, and at an official rate of exchange fixed by the authorities from time to time. This rate always puts the domestic currency at so high a figure in comparison with its real value as quoted in all money centres outside the country as to make it unprofitable, sometimes ruinous, to do any considerable amount of paying at the legal rate, and has brought about a bootleg trade or Black Exchange by money brokers, who buy and sell at illicit figures nearer the real value; necessarily known to the Government but not suppressed, though occasionally professing to carry on business under a cloak of secrecy. In Argentina, an Exchange Control Commission was created[1] with power to designate certain banks in Buenos Aires through which all foreign exchange transactions must be made, to fix daily the rates of exchange, to control exports, and to punish violations by a fine of ten times the amount of the illegal transaction and publication of the name of the offender. Regulations for the operation of the Commission were issued[2] and the decree itself, being only of the Provisional Government, along with many others, especially those concerned with the raising of money for the State, was probably duly legalized and continued by Congress at its next regular constitutional session.[3] The Commission has modified frequently the details of its regulations, and is so constantly handing down rulings, issuing public notices and sending special circulars of instructions to all the banks, that in the absence of any authoritative collection or publication of all the existing provisions, not even the official bankers pretend to know just what can be done in any given case, and undertake only to make application to the Commission for information, and to act in accordance therewith. The details will presumably soon be codified and authenticated in some way, and meanwhile the general outlines are clear: total prohibition of remittance abroad, except through authorized channels at official rates, and perfectly well known facilities for and profit in illegal transactions at world-quoted rates. After much discussion and delay,[4] Argentina has imposed a federal tax on Incomes,[5] effective from January 1, 1932, until December 31, 1934 only, according to its present terms. The Provinces have already protested that this tax invades a field which properly belongs to them, but the Central Government has so far avoided any direct test of the question as to unconstitutionality or on any other grounds before the courts, and will undoubtedly seek to extend the tax before the present term expires.

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[1] Law 5,158, April 12, 1933.

[2] Constitution, Art. 86; Law of the Organization and Attributes of the Courts, October 15, 1875, Art. 108.

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[1] Ministers' Decr. 1,060, October 10, 1931, beginning "Whereas, the abandonment of the gold standard by England has created a situation of expectancy in the markets of the world already strained by the crisis," etc.

[2] Decr. Pres., January 25, 1932, and March 14, 1933.

[3] Cf. Law 11,582, June 8, 1932; Law 11,588, June 24, 1932.

[4] For history of the movement since 1918, see *La Cuestion Impositiva Argentina*, Roberto Perez (Buenos Aires, 1932).

[5] Law 11,586, June 17, 1932, modified by Law 11,682, December 30, 1932.

In Chile, foreign exchange is under the control of an International Exchange Commission [1] of seven members and all lawful operations to the exterior have to be made through the Banco Central de Chile. The official rate of exchange is here so far away from the world market value that comparatively little official trading is done, and there is less complexity and confusion in the working of the Commission. In one effort to reduce the illicit business, the brokers' safes were suddenly raided, some of the contents photographed and everything returned: there were then published, with little comment, facsimiles of cheques bearing the signatures of high officials, in both the executive and legislative branches, many prominent foreign business men and nearly all the heads of the principal Legations and Consulates, which had been sold for export contrary to the law, presumably at better than official rates; with the effect at least of a great confabbing and scurrying in diplomatic circles and the finding of a new method of realizing on salaries from abroad.

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[1] Law 5,107, April 19, 1932; Regulations, May 7, *Diario Oficial*, May 9, 1932.

# AFRICAN NATIVES UNDER THE ENGLISH SYSTEM OF PENAL LAW.

[*Contributed by* C. Clifton Roberts, Esq.]

It is proposed to discuss the laws in force in our African dependencies with a view to showing how little attention has been paid to the native point of view, and how frequently they have been modelled on the laws in force in various parts of Africa and other of our Colonial dependencies, without regard being paid to the individual requirements of the territory for which they are intended. Many of these laws and regulations as a result bear hardly on native life and progress, create a feeling of unrest, and while accepted as inevitable by the native are only so accepted in the sense that it is more profitable to acquiesce than to rebel.

**The Indian Penal Code.**—Let us start by taking the Penal Code recently introduced into the East African territories. In the first place this code abolishes the Indian Penal Code which was previously in force. It is true that the old penal code now superseded was far from satisfactory, but at any rate many of the provisions of the Indian Penal Code were more suited to native communities, and did allow some discretion in the imposition of penalties and in the alteration of charges. On the whole India can be said to have benefited under the Indian Penal Code, and it would seem reasonable to suppose that Indian conditions often approach somewhat closely to those in Africa.

**Drafting of Laws.**—The original draft has been so altered and amended by the legal officers of the various territories that it is hardly true to say that we now have a penal code which is really the same for all. In the drafting of the Model Code sent out to the territories it seems that no real expert opinion on native customs and mentality was obtained. There is apparently no established body of informed native opinion which is at present available to Colonial legislators. The advice and experience of the many local officials who would be only too willing to place their services at the Government's disposal, and the experience gained and recorded by European countries with extensive colonial possessions, do not appear to have been drawn on. The legal official who too often is inexperienced in native matters and has only recently taken up work abroad is asked and expected to draft a law or regulation without expert assistance which may seriously affect the future of the native community within his sphere of work. In dealing with the question of what laws are desirable where primitive people are concerned, no system appears to be followed; each law seems to be applied as the necessity arises to meet some difficulty, some increase in crime, or some special form of control which may appear necessary at the moment.

**Variety of Conditions.**—Our legislators do not seem to realize that it often takes some time for old customs and rites to be replaced by more modern and possibly more desirable practices, that the conditions are not the same in the urban areas at some distance from the town, and in the native village which may be still hardly touched by contact with the European. Many natives to-day, although working in mines or for European employers, lead entirely different lives when at work and when they return to their villages. What we consider as offences and even crimes, the native according to his customs and traditions often looks upon as a duty. It is not until a real knowledge of the language is acquired and a lengthy residence in the country among native people has been passed that one realizes how apt the native is to give the white man a prepared answer, and to appear to acquiesce in his wishes, but only to be doing this in order to please and satisfy. It is here that the work of the anthropologist is of such great value; he has the time to observe, he has no work which has to be done in a stated time, in fact he has no axe to grind except to obtain the information he desires. Even the missionary, experienced as he so often is in native culture and native languages, has his primary duty—the obtaining of converts and the education of his pupils along the path he has mapped out for them.

A few sections of the Model Penal Code applied to East Africa are set out (p. 173) at the end of this article, merely as an example of the form of legislation in use.

**Proceedings in Court.**—No doubt this Penal Code is excellent where one has to deal with Europeans, but it hardly seems to fit the case when we picture a court scene with native prisoners in the dock. The native witnesses so often have their answers prepared as they think to suit the case, or according to the tribal custom in dealing with strangers. The interpreter, who often does not know the local dialect, is anxious to get the case finished and to please both the government officials and the defending counsel. Even the assessors where they have been called on to assist the judge, although they are aware of the tribal customs and local practice, still feel convinced that the white man, a member of a superior race, has decreed that the act committed is punishable; and although they do not necessarily agree with his view or with the equity of the case, they feel that they have no option but to find the accused guilty. Even the accused accepts the position as part of the new system which has now for some time been causing so strange and far-reaching an upheaval in his village life.

How many natives have as yet learned to speak the truth and to understand the meaning of an oath? What does the native understand by ignorance of the law being no excuse? The principle may be a good one, but even in England it works great hardship. Intoxication, again, is a common failing among natives. English law as to intoxication as a defence in the case of murder has been much criticized. Is it right to apply it in the case of natives, especially when intoxication among native peoples so often has been the result of our own actions in permitting and even encouraging the sale of liquor?

**Labour Laws.**—Picture the same scene where less serious cases are being tried. Breaches of contract under "Employment of Natives Ordinances," failure to pay taxes, and offences against the many rules and regulations under the Township Ordinances, Registration of Domestic Servants Ordinances, Labour Ordinances, etc.

Contracts of service in the case of the employment of natives carry penal remedies, arrest on warrant, and imprisonment pending trial because, dealing with these matters, it is the employer and not the employee who has been mainly considered. It may be argued that if the native servant runs away he is difficult to trace or identify. That is no doubt true, but it should be possible to remedy this difficulty of identification. Many of the fines imposed are also out of all proportion to the ability of the native to pay, and a term of imprisonment follows as a matter of course.

**Rogues and Vagabonds.**—The definition of "Idle and Disorderly Persons," "Rogues and Vagabonds," leaves far too much room for abuse. It is not yet realized that gaming and betting and indulgence in games of chance are natural to many native tribes and take a long time to eradicate. Again, should we if we were dealing with Europeans inflict birching and flogging for what in many cases are minor offences? In some cases this may be desirable, but it is still far too prevalent and ordered by the magistrate without hesitation in the case of a native offender, merely because his colour justifies according to his view the infliction of that form of punishment. Especially in the case of juvenile offenders a whipping is often considered the most desirable remedy. Sometimes that is the case, but more often it is inflicted owing to the lack of any other method of dealing with the case, no probation system or industrial school being available. It is important therefore to consider seriously whether the present English penal system is really suitable for application to an African community. This question brings us to further questions: What is the ideal at which a penal system should aim when we are dealing with an African community? Are we making any real effort to humanize administration?

**Classification of Natives.**—The problem can only be faced if we concede certain fundamental truths. The natives must be considered under various heads or groups—those living under tribal organization, those detribalized urban workers who are becoming Europeanized in their habits of life and thought, and the large intermediate class in transition, with its roots in the native territories but its occupation for part of the year in the industrial centres. It is important to consider whether one and the same judicial system can and should apply to these three classes. It has been said that where a native and a European are convicted of the same offence the punishment of the native should be heavier than that of the European, for the reason that the latter will feel his degradation more. As a prominent African once remarked, "Justice may be blind, but in Africa it is not colour blind." The African native is conscious of inequalities before the law; he feels strongly that every African is entitled, perhaps not quite to the same degree, to some measure of fairness which will free him from regarding the colour of his skin as a stigma entitling him to repression. By equality of treatment before the law he does not necessarily mean identical treatment. May it not well be that the different classes of Africans, representing as they do stages in the development of the ultimate Europeanization of all, are entitled to three different stages of a legal system, of which stage is adapted to its own particular needs, and framed in such a way as to lead to and dovetail into the next? The modern systems of penal reform are unsuited to certain types of rural Africa. What seems to be needed is an elastic system which can be modified so as to suit each grade of African development. Africa has framed her laws before her policy; it is urgently necessary to reverse that order before it is too late. The policy in South Africa may well be taken as an example of what to avoid.

**Conclusion.**—Any policy which is to be successful must be based on the following amongst other principles:

(1) The laws must be so framed as to secure the protection and progress of all sections of the community.

(2) In the eyes of the law all sections are entitled to complete equity in respect of benefits and responsibilities.

(3) Criminal codes must be framed with due regard to the social consciousness of the community to which they apply.

(4) All penal systems should predominate in constructive tendencies over retributive.

(5) The aim of penal and legislative codes should be readily understood by the community to which they are made to apply.

## DRAFT MODEL PENAL CODE FOR THE EAST AFRICAN DEPENDENCIES.

### *Commencement of Code and its Operation in Lieu of the Indian Penal Code.*

(2) From and after the enactment of this code, the Indian Penal Code shall cease to be applied to the Colony.[1] Any reference to any provision in the Indian Penal Code in any Ordinance in force at the time of such enactment shall, so far as is consistent with its context, be deemed to be a reference to the corresponding provision in this Code.

### *General Rule of Construction.*

(4) This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English Criminal Law and shall be construed in accordance therewith.

### *Ignorance of Law.*

(8) Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.

### *Intoxication.*

(14) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state

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[1] For Colony use the word "Protectorate" or "Territory."

of intoxication that he is incapable of understanding what he is doing, or controlling his action, or knowing that he ought not to do the act or make the omission, provided that the thing which intoxicated him was administered to him without his knowledge or against his will. Save as aforesaid a person shall not, on the ground of intoxication, be deemed to have done any act or made any omission voluntarily, or be exempt from criminal responsibility for any act or omission.

When intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, shall be taken into account for the purpose of ascertaining whether such an intention in fact existed.

### *Fines.*

(28) Amount of imprisonment which, in the case of a native, can be imposed in default of payment of a fine:

| *Amount.* | *Maximum Period.* |
|---|---|
| Not exceeding 1*s*. | 7 days |
| Exceeding 1*s*., but not exceeding 2*s*. | 14 days |
| Exceeding 2*s*., but not exceeding 3*s*. | 1 month |
| Exceeding 3*s*., but not exceeding 6*s*. | 2 months |
| Exceeding 6*s*. | 3 months |

### *Challenge to Fight a Duel.*

(69) Any person who challenges another to fight a duel, or attempts to provoke another to fight a duel, or attempts to provoke any person to challenge another to fight a duel, is guilty of a misdemeanour.

### *Perjury and Subornation of Perjury.*

(81) (1) Any person who in any judicial proceeding or for the purpose of instituting any judicial proceeding knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding is guilty of the misdemeanour termed perjury.

It is immaterial whether the testimony is given on oath or under any other sanction authorized by law. It is immaterial whether the false testimony is given orally or in writing.

### *Rogues and Vagabonds.*

The following persons:

(143) (2) Every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself.

(5) Every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time or under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose;

Shall be deemed to be a rogue and vagabond, and is guilty of a misdemeanour, and is liable for the first offence to imprisonment for three months, and for every subsequent offence to imprisonment for one year with or without flogging or whipping.

### *Manslaughter.*

(161) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed " manslaughter."

An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

### *Murder.*

(162) Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

### *Punishment of Murder.*

(163) Any person convicted of murder shall be sentenced to death.

# THE LAW OF TORTS IN DENMARK.

[*Contributed by* HENNING HOLM-NIELSEN, ESQ.]

THERE is scarcely any province in the realm of law covered by such a mass of juridical theory as the law of torts. The treatises on this subject are legion. Over and over again the authors turn to such problems as whether the tort is a violation of the subjective right (*subjektives Recht*) of the damaged person, or of the objective rule of the law (*objektives Recht*). Certain legal problems have a curiously attractive force. Once brought in question, such problems will initiate endless discussions. Or take the discussions as to the purpose (*Zweck*) of the law of torts. Is this purpose "indemnification"—to make amends for the damage? Or is it "prevention"—to prevent people from doing damage, because of the risk of having to pay damages?

Much more useful than the discussion about the purpose of the law of torts would be an examination of its actual effects. To what extent does the law of torts now in force make amends for the damage suffered, and to what extent does it prevent damage from being done by negligence and otherwise? All the old theoretical discussion ought to be given up, and instead investigations as to function in practice, and practical effect and value, should be initiated. There is an increasing feeling among lawyers that legal doctrine to a certain extent has outlived itself, that not only legislation, but also the juridical method, as such, has to be revised.

In various countries there are such tendencies, especially the "functional jurisprudence" in the United States of America. As to insolvency law, *e.g.* Professor William Douglas, of Yale Law School, together with Judge Clark, New Jersey, and Mr. W. C. Plummer, of the Board of Trade, Washington, have instituted "bankruptcy clinics" to examine the function of the present American Bankruptcy Act. The function of private arrangements has been examined at West Virginia University by Professor T. C. Billig. In Germany, Professor Arthur Nussbaum, of the

University of Berlin, is applying a like method, which he calls "*Rechtstatsachenforschung*"—that is, "study of the facts of law." In Denmark, Professor Vinding Kruse, of the University of Copenhagen, demands that jurisprudence should be founded on experience.

The law of torts needs a close examination on these lines. This is evident by recent legislation in this domain, which is experimenting with the various types of liability. At the same time, it has over and over again been discussed whether liability should be "subjective" or "objective" (*subjektive—objektive Haftung*). Is one to be liable for all one's torts, or only for such torts where a subjective fault, be it intention or negligence, can be proved? And it is now *ad infinitum* disputed whether the one or the other principle is to be followed by legislation and judicial decision. In various countries, *e.g.* Denmark, the law of torts has not yet been totally covered by legislation; it is in great part, and in particular its general principles, case law.

In Denmark, as in other countries, liability was at first objective: the individual was liable for all of his torts, even if he were not guilty of negligence or intent. About the end of the eighteenth century, however, liability was limited to torts with subjective fault, the so-called culpa-principle, which is still the general principle of the Danish law of torts. But it was not long before this principle proved unsatisfactory in certain relations, namely as a consequence of the technical and industrial progress in the nineteenth century. So we have a considerable number of Acts on the law of torts in special relations, modifying the culpa-principle. I may mention some of the later of these Acts.

Liability of railway companies. The Railway Act, No. 117 of March 11, 1921, s. 1, has recognized a pure objective liability. The railway company is liable, even if the plaintiff cannot prove any negligence committed by the staff or workers. And, moreover, the company cannot free itself from liability by proving that the staff and workers are not guilty of negligence. This, however, it could under the old Act of 1898. The Aerial Transport Act, No. 175 of May 1, 1923, s. 36, has the same objective liability as the Railway Act, 1921.

The Electric Wires Acts, No. 77 of April 19, 1907, and No. 161 of May 11, 1928, s. 5, as well as the Autocar Act, No. 144 of July 1, 1927, s. 38, on the other hand, place the onus of proof on the owner of the car and the electric works; they are free from liability when they can prove no negligence (the same " presumption of culpa-rule " as in the Railway Act, 1898).

Is there, however, any real reason for this difference between railways (and aerial transport) and autocars (and electric wires) ? Cars are not less dangerous than railways or aeroplanes.

There is the same uncertainty as to the problem of contributory negligence. Can the defendant *totally and unconditionally* free himself from paying damages ? In some cases the defendant will be quite free from paying damages when he can prove intent or negligence on the part of the plaintiff, *e.g.* as to damage by railways and electric wires (Acts 1921, s. 1, and 1907 and 1928, s. 5). In other cases the defendant is only quite free when he can prove intent or grave negligence (Aerial Transport Act, 1923, s. 36). And when damage is caused by an autocar, the owner will only be quite free when he can prove the plaintiff's intent (Act 1927, s. 38). In other words, as regards contributory negligence, the liability of the owner is more severe as to cars than as to aerial transport, and this again more severe than as to railways and electric wires. But is there any real reason for these differences ? and which system works best in practice ?

An *apportionment* of the damage is recognized, as to aerial transport, when the defendant can prove simple negligence of the plaintiff (Act 1923, s. 37), and as to autocars when negligence, grave or simple, is proved (Act 1927, s. 38). And also, in the latter case (grave or simple contributory negligence in autocar accidents) the court *may* totally exempt the defendant from paying damages. As to collision of ships, the general rule is apportionment of the damage according to the nature of the negligence committed by the defendant and the plaintiff (Maritime Act of April 1, 1892, s. 220).

What a confusion of legislative experiments ! and only some of the main points have been given. As a matter of fact, these Acts are even more intricate, because in some cases it is necessary to consider whether the damage is done to a person or to goods, and further, to persons and goods conveyed by, say, aeroplane, or not. And, as for contributory negligence, whether this is contributory negligence of the plaintiff or of some third person.

It should be a task of juridical doctrine in the domain of the law of torts to ascertain which of these various systems of liability works best in practice. This, however, could only be thoroughly done by co-operation and organized work especially in the realm of comparative jurisprudence, in order to compare and estimate the systems of the law of torts of various countries.[1]

Comparative jurisprudence may prove fatal if the text of the laws only is compared without having regard to the function in practice of those laws. Many a section of this or that Act may look perfect, and may seem to be desirable for incorporation in the law of a particular nation ; however, a close examination will often show that the section in question works but ill in practice, or is misused to foreign ends, or, perhaps, is not functioning at all (paper-law). When its effect in practice is established, then it may be compared with some hope of having exact results.

Certainly, empiric jurisprudence will meet extraordinary difficulties in the law of torts. In bankrupcy law, for example, it is possible to have to a certain degree exact information from bankruptcy statistics. In the law of torts, there is so far no possibility of verifying by statistics.

The study of comparative jurisprudence is now being organized by the Academy of Comparative Law at The Hague. Research must be organized, as it surpasses the power of one man. The legal decisions of every country that might be willing to co-operate have to be examined with a view to establishing to what extent and under what conditions damages are really imposed in the various domains of the law of torts. Further, it must be established whether there is general satisfaction, or dissatisfaction, with the extent and conditions of liability. In order to do so it is necessary to obtain the opinions of the organizations of autocar owners, the directors of railway companies and of insurance companies, the judges, solicitors and police officers dealing with traffic accidents, and so forth. If possible, it is necessary to ascertain by way of questionnaires, for say one year, in a certain limited jurisdiction, the opinion of the plaintiffs and defendants of all cases in the law of torts. An almost endless field of juridical research is thus opened for investigation. Every domain of law, civil and criminal, and procedure should be examined on these lines. This is so much more necessary, because Europe at the present time is divided into about thirty various legislative territories, all of them legislating and revising *à part*. The way will be long and laborious, but it will be worth while to traverse it.

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[1] Sixth point of the Agenda of the International Conference of Comparative Law at The Hague, August 2–6, 1932 : *Les principes généraux de la responsabilité délictuelle dans les différents systèmes juridiques.* This essay is an extension to a certain point in the author's report to the Conference.

# THE LAW OF SLAVERY IN ABYSSINIA.

[*Contributed by* A. L. Gardiner, Esq., M.A., LL.B., *of the Inner Temple, Barrister-at-Law.*]

**Introduction.**—The object of the present article is an attempt to state as exactly as possible the law of slavery as it exists in Abyssinia at the present day. As is well known, in 1924 Abyssinia became a member of the League of Nations, and since that time the question of the existence of slavery in the country has been continually in the public eye. Of recent years legislation has been passed which, it is claimed, will automatically terminate the existence of slavery within a limited number of years. In the meantime slavery still exists, and in any event the exact effect of this legislation cannot be understood without a knowledge of the law as it stood before that legislation was passed, and in this article each topic of the law is treated historically in order to show the exact position on the eve of the modern legislation, and then the modifications brought in by that legislation are discussed. The question as to whether the law is universally applied or not, and how far the new reforms are applied in practice, is outside the scope of this article. At the same time, in view of the fact that in Abyssinia the central government has not always a tight control, if a control at all, on its outlying provinces, it would give a completely false picture merely to state the law without drawing attention to the fact that as regards some matters the law has not been followed, and customs have grown up and have been followed which, although absolutely illegal and in no way having the force of law, have in many districts, if not universally, in practice superseded the law. In such a matter as that of slavery this is easy to understand, as most chiefs and officials, including judges, are slave owners, and thus in favour of guarding their rights of property. Hence the law may well say that in such and such a case a slave is entitled to assert his freedom; but there always remains the practical difficulty as to how he is to do it, since his master will take care to prevent him taking the necessary steps, and even if he gets past this first obstacle, his application is likely to come before persons whose sympathies are with the master. The modern legislation recognized this difficulty by appointing special judges, quite apart from the ordinary courts, to hear cases affecting matters of slavery.

Since slavery is a perfectly legal and recognized institution in Abyssinia, we find slaves concerned, or liable to be concerned, with almost every kind of activity, and hence a full discussion of the law affecting them would entail to a large extent a statement of the law of Abyssinia. It is possible, however, to shorten the discussion by showing how their position differed from that of chattels generally, and this is the method which will be adopted. In view of the fact, however, that very little has been written about the Abyssinian law in general, certain points of general law are discussed more in detail than would be necessary in the case of a law which is well known and easily accessible.

**Sources of Law.**—Apart from certain proclamations, for the most part modern, the only written law existing in Abyssinia is a legal work known as the Fetha Nagast, or Legislation of the King. This book was written in Arabic by a Coptic savant, Al-Assad Ibn-al-Assal by name, in the thirteenth century, and probably about two centuries later was translated by an unknown hand into Gez, and introduced into Abyssinia, where it quickly obtained popularity and was regarded not as a mere textbook, but as a definite code of law.

In the introduction to his work Ibn-al-Assal cites his authorities which may be briefly summarized as : (1) the Old Testament, (2) the New Testament, (3) Canons of the church laid down at sundry general councils, (4) writings of the fathers and (5) a collection known as the Canons of the Emperors, dealing in particular with secular rules and laws. In the law of slavery many points of resemblance will be noted both with the Mosaic and with the Roman law. Further, inasmuch as the compiler was writing primarily for Christians living amongst the Mohamedans of Cairo, it is only natural that he drew also on the Mohamedan law, though he does not mention the fact ; and it is probable that he utilized the Tanbih of Ishaq-as-Sirazi, a manual of the Shafite rite published about 1060.

**Customary Law.**—In course of time Gez became a dead language in Abyssinia, being superseded by Amharic as the official language. Its use, however, continued in the church, the formal services being in Gez. At the present day it is known only to a very limited number of persons, the average priest being able merely to recite the words of the service in Gez, without understanding the language. The Fetha Nagast, however, has never been translated into Amharic, the only translation which exists at all being that of Guidi,[1] and hence it is not surprising that its provisions are not generally known, and the law of Abyssinia has become mainly customary law. This is not, however, to say that the provisions of the Fetha Nagast have been entirely superseded. In the first place a great respect is still given to its provisions, which are still regarded in theory as the law of the land ; and secondly, inasmuch as its provisions were at one time actually applied, much of the customary law in fact is based on it. There are, however, numerous instances where custom, recognized as law, has entirely superseded the rules of the Fetha Nagast. Apart from such customs, which definitely are law, and would be recognized as such by any court before which they happened to come, there are, as stated above, other customs, which cannot be regarded as law, and which would not be recognized as such by any unbiassed court, but which in fact have been in the past applied sometimes merely locally, but sometimes more or less generally throughout Abyssinia. This matter will be referred to more in detail below, particularly in connexion with the question of the transfer of slaves.

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[1] Guidi—*Il Fetha Nagast o Legislazione dei re.* Roma, 1899. References to matters concerning the law of slavery are found on the following pages : 24, 92, 93, 112, 135, 139, 140, 193, 194, 232, 258, 264, 265, 275, 276, 291, 296, 298, 299, 300–5, 312, 316–22, 324, 333–7, 346, 366–8, 372, 375–7, 381–3, 386, 393, 394, 396, 406, 416, 417, 428, 444, 445, 457, 459, 460, 473, 478, 479, 483, 495, 497, 498, 501, 502, 505, 509–11, 516–18, 522, 523, 525, 538, 540 and 541.

Like most customary law, the modern law of Abyssinia is most difficult to ascertain. It is true that the decisions of the higher courts, including that of the Emperor, are carefully recorded, but they are not published, and access to them is difficult, at any rate for a foreigner. Further, they are not digested, or even indexed, and hence it would require years of work to deduce from them the law of the country. It is necessary then to ascertain the law by inquiry, and in doing so one is faced with the usual difficulty of a mass of conflicting answers. An examination of the Fetha Nagast shows that it was written by a person capable of understanding points of law, and of investigating logically theoretical cases. The whole tendency of modern Abyssinian law seems to have been in favour of simplification and rule of thumb. This by no means implies that the Abyssinians are incapable of reasoning, but the speculative minds seem to have considered theology as more worthy of their attention, and to have neglected entirely the science of law as a subject of study. It is true that the country as a whole is interested in and likes law, but this is probably owing to the quarrelsome nature of the inhabitants, and hence if a man does not know something about law, he is unable to protect his interests. The judges moreover have no special training in law, nor have the Abyssinian advocates who practise before them, and one remarks that the latter rely largely in their pleading on oratorical effect and little practical points of procedure. I emphasize this point, namely that Abyssinian law is an intensely practical affair, in order to show the difficulty in attempting a statement in any way complete of any particular topic. Having succeeded in getting together a number of points, one proceeds with the inquiry : But what is the law if such and such a thing happens ? To this one gets the answer that such a thing does not happen, and therefore there is no law about it—that is to say, the matter being outside the ordinary facts of life, it is regarded as completely devoid of interest. To give an example, if one inquires whether a master is liable for the rape of his slave, one receives the answer that no slave would refuse her master—on the contrary she would welcome his advances, and therefore the point could not arise. Again, in the discussion below the question is not considered as to the effect of a man contracting with a slave, or a slave being allowed to do a certain act, under the impression that he was free. This question has great importance in some systems of law, but in Abyssinia it is a typical case of a matter which simply does not happen. In the first place, communities being small, it is usually well known to all whether a man is free or a slave; and in the second place, in Abyssinia no business great or small is ever done without the production by both parties of a guarantor, who would not be accepted by the other party unless he knew him. Hence a slave would be unable to get a guarantor, and thus no one would contract with him; or if he did, the guarantor would become liable on the contract, or for the act in question.

The present article is divided into four heads: the slave as a man, the slave as a chattel, enslavement, and manumission.

**The Slave as a Man.**—Just as in Roman and in other laws dealing with slavery we find two conceptions of the position of the slave, namely that in many respects he is considered as a mere chattel, whereas from other points of view he is considered as a man, so too in Abyssinian law we find this distinction, and this is especially the case with respect to the Christian slave. The Fetha Nagast not only recognizes the Christian slave as a son of the church, but it obliges the master to give him facilities for religious worship. A duty is laid on the master to compel his non-Christian slaves to accept baptism, and to have baptized any slave children born in his house. The master, if he himself is not a Christian but becomes converted, is not to refuse to be baptized along with his slaves. Slaves are to be freed from work on Sundays and Festivals, and on those days they are to attend church to instruct themselves in the service of God. A slave could become a cleric or a monk with the consent of his master, but if the master so consented he had to free him, since it was not considered fitting that a man who was actually a slave should be a minister of God. On the other hand the slave was quite incapable of performing any public act: thus a slave could in no case be a judge, since he who cannot dispose of himself cannot dispose of others; and the same reason is given for excluding him from being a guardian; nor could he be appointed by the master to represent him in a court of law, because the slave is not the equal in honour of the freeman; nor could the evidence of a slave be accepted in any circumstances, even in a case in which his master had no concern.

The position of the slave with regard to the church has remained much the same in modern times, and especially it has remained the duty of the master to compel the conversion of non-Christian slaves, and to cause all children born in his house to be baptized, an exception being recognized in the case of slaves who are already of the Jewish or Moslem faith. Owing to the modern laxity as regards church attendance and the observance of Sunday, the rigour of the old law as to these matters is not now strictly observed, either in the case of the masters or of the slaves, but in theory the old law still remains in force. But the slave's position with regard to public acts has now become greatly modified. A master of position can, and often does, appoint his slave to act as judge, and in this event he can decide cases even between free men; and it is not at all uncommon for a master to appoint his slave to represent him in a lawsuit —all that is necessary is that he shall have clear authority to do so. He can also at the present day be appointed a guardian, but only with the consent of his master. Then too the evidence of a slave is accepted in all matters, except in those affecting his master. It is still law that a slave, or even a freed slave, cannot give evidence on behalf of or against his master, or his master's son, nor can the master give evidence for or against the slave, but this depends rather on the general provisions of the law of evidence, which exclude the evidence even of free servants or of relatives.

The Fetha Nagast clearly demonstrates the patriarchal character of slavery in Abyssinia, for it lays down in express terms that slaves are not to be despised, but that they are to be esteemed like children, and further that slaves are to obey their masters, and masters are to love their slaves, and to act with justice and equality towards them and to pardon their offences ; and this conception of slavery exists up to the present day.

In the Fetha Nagast a very high standard of morality is inculcated, only one form of marriage, namely with communion and in church, being recognized, and concubinage being absolutely forbidden. In modern times the marriage with communion has become very exceptional, being usually only employed in the case of people of position. The ordinary form of marriage at present in use consists in the parties counting out their respective goods before witnesses, the rule being that if they divorce —which they can do at will—each normally takes half the common stock. This may be regarded as the ordinary respectable form of civil marriage, but besides this there is the form, which is the rule rather than the exception amongst the lower classes, of simply cohabiting with a woman, with the agreement to pay her so much a month. In addition to this, concubinage is very prevalent, even in the case of a man who has a wife, though this gives certain rights to the wife regarding the division of property, if she chooses to divorce. This lowering of the general standard of morality affects from many points of view the law of slavery. In the first place with regard to the marriage of a slave, under the régime of the Fetha Nagast a slave could, and as a Christian was obliged, if he married, to do so legally, that is to say in church with communion. It is probable that at the present time such a marriage of a slave is in theory still possible, but in practice it is unheard of. The second form of marriage is inapplicable to a slave, for as we shall see later he has no absolute ownership of any property. There remains then the third form, namely mere cohabitation, which is in practice the only form of marriage open to slaves at the present time.

The provisions of the Fetha Nagast were severe with regard to the sexual relations of a free man, and still more of a free woman, with a slave, and punishments either ecclesiastical or civil were usually imposed on both the free person and the slave. Concubinage being absolutely forbidden, it was laid down that if an unmarried man had a concubine, he should put her away if she were a slave, or marry her if she were free, and this under penalty of exclusion from the church. On the other hand, if the man was married he was subject to ecclesiastical penalties, as was also the woman if free, but if she was a slave she was to be sold by the Governor " in another country far away." The provision with regard to the sale of the slave only applied if she was the slave of the man whose concubine she was : if she was the property of another, her master could claim damages from her paramour. In the case of the free woman having intercourse with a slave, several cases arise. If the slave were not her property, she incurred ecclesiastical penalties only, as was probably the case with the slave, and in addition she incurred other penalties if she was married. If the slave was her property, the slave was to be executed, unless compelled by her, if she was married, and in other cases the slave was to be beaten and sold. In this case she incurred penalties which varied according to whether she was married, and whether she had children. The punishment was also death for a slave who raped his mistress, or who aided anyone else to do so, or failed to come to her assistance when others to his knowledge were assaulting her.

It is probable that in the old law a lawful marriage was possible between a free person and his slave, or with the slave of another with the consent of the master. Such marriages, however, were not looked on with favour, and in the case of a free woman it is provided that " it is not fitting for her to marry a slave and live with him in the house of his master, or that she make him live with her, with the consent of his master, and that in such a case she becomes like him, the slave of his master." So too it is provided that it is not proper for a woman to marry even the slave who has been freed by her late husband. It is probable that a man who desired to marry a slave usually freed her, or caused her to be freed before he did so, and as an encouragement to this course it is provided that if a man married a slave girl, he could not be appointed a cleric.

With the more lax notions of marriage, and the practical recognition of the state of concubinage, most of these restrictions are non-extant in modern Abyssinian law. There is no penalty on an unmarried man who has intercourse with his own slave ; in fact, if she is a regular concubine she obtains the position of head of his slaves, being in a position which may be termed semi-free, with certain rights which will be further discussed below ; and even if the slave belongs to another no action for damages now lies, unless he kept her so as to deprive the master of her services. In the case of the married man the rule is the same, except that the intercourse is recognized as adultery if the wife chooses to divorce, in which case she would have certain rights as regards the division of the property. In no case is the slave now liable to any penalty, except that in the case of a divorce she might be allotted to the share taken by the wife, which might well constitute a substantial punishment. In the case of a free woman who has relations with a slave, whether her property or not, no penalty is incurred by either party at the present time. Of course if she is married, the intercourse counts as adultery for divorce proceedings by her husband. The law remains the same as regards rapes, etc., by the slave of his mistress, allowing for the modification of punishments in the modern law.

**The Slave as a Chattel.**—The position of a slave as regards his incapacity to own property absolutely has changed very little since the time of the Fetha Nagast. Through reasons of convenience, in many cases the slave was allowed by his master to possess a certain amount of property, but owing to the fact that trade is little indulged in in Abyssinia, and the people for the most part live a simple rural life, this property did not receive a development comparable to the *peculium* of Roman law. Thus a master often gives a slave a piece of land. In this case the slave can utilize the produce of the land for his maintenance, but the land remains the absolute property of the master. In passing it may be noted that landowners often make gifts on similar terms to free servants and others, as well as to slaves. So too the master may give to the slave domestic animals or other chattels. In this case the slave has the use of them, but he cannot dispose of them without the consent of his master, either in his lifetime or by will, and the master can at any time resume possession of the same at his pleasure. At the death of the slave these things if not expressly taken over by the master would pass to the children of the slave, but as these children are also the slaves of the master, the position is not changed. Should, however, these children in some way have passed into the ownership of someone else, and the master allowed the chattels in the possession of the slave at the time of his death to go to them, he would cease to be owner, and they would be at the disposal of the owner of the children. Should the slave happen to have any money he can purchase other chattels, which in like way are at the disposal of his master. As stated above the slave cannot dispose of the chattels in his possession without the consent of his master, but normally he would be permitted to make small exchanges, and even sell certain things such as the produce of the stock and crops, etc. Goods found by a slave are in the same way at the disposal of the master.

The position is the same in the case of goods left to a slave by will. If when the will operates he is still a slave, the goods become the property of the master, who of course can allow the slave to possess them. If, however, the slave is free when the will takes effect, the goods go to him, and not to his late owner. Of course a master cannot leave anything to a slave, or make him his heir, unless at the same time he frees him, since the slave himself is a thing to be inherited.

Regarding the power of a slave to make a will, the Fetha Nagast is not clear. In one place it is stated expressly that the will of a slave, a child or a lunatic is not valid, but elsewhere it is stated that he can make a will not only in favour of his children, but also of outsiders, with the permission of his master. In modern law the slave can make a will with the permission of his master, but not without. If the master has given him the permission in writing, he cannot subsequently withdraw it, but it appears that he can do so if the permission was only verbal. This, however, is probably merely a question of evidence. If a slave who made a will without the permission of his master was freed, and then died, the will was not valid by the old law, but at the present day it would be held to be valid.

Regarding freed slaves, it is laid down by the Fetha Nagast that if a master makes a letter of manumission, stating therein definitely that the slave is free both as to his person and to his property, the ex-slave can make a will like a free man: but if in the letter of manumission the property is not mentioned, on the death of the ex-slave it goes to his late master or his heirs. The modern practice is that if the slave is freed for good service or ill-health, he is allowed to keep at any rate property other than land: but if he is freed because he is of bad character and the master wants to get rid of him, the master can resume possession of his property before he frees him—if he does not do so, it belongs absolutely to the ex-slave. It is also common for the master before freeing the slave to stipulate that the slave when freed shall perform certain services. If the ex-slave fails to perform these, he is liable as a free man for breach of contract, but he cannot be re-enslaved.

There is some conflict in the old law as to the powers of a freed slave as to the disposal of his property. The law appears to be that if by will he left his property to his natural heirs, one-quarter went to the late master, and three-quarters to the heirs; but that if he left his property to outside persons, they took two-thirds and the late master one-third. If on the other hand he died intestate, all his property went apparently to his late master, though there is some authority to the effect that a certain part went to his natural heirs. If the late master was dead, his heirs stood in his place. If the ex-slave had formerly been jointly owned by several masters, these or their heirs took to the extent of their former shares. At the present time the rule is that if the ex-slave has children, they inherit all his property; but if he has no children, his property goes to his late master.

The position of a slave as regards contracts is simple. The Fetha Nagast says that if a slave admits that he is a debtor, the admission is valid, and if he has the authority of the master to make the admission, he binds the master; but if not, he is personally responsible, and must pay from his earnings, and if he earns nothing, he must pay after he is freed. The modern law is the same, and the slave can in no case bind his master without clear authority to do so. On the other hand, an admission in favour of a slave accrues for the benefit of his master. Naturally there can be no such thing as a contract between a slave and his master, except a contract made at the time when he is freed, to operate after he is free.

In discussing the matter of torts both by third parties against the slave and thus against the master, and by the slave against third parties, it must be borne in mind that in Abyssinian law there is no clear distinction between a tort and a crime. Although in the Fetha Nagast some trace is found, following the Mosaic law, of a kind of public punishment of crimes, it is clear that in ordinary circumstances the law had to be set in motion by the party aggrieved, or by the relatives in the case of homicide, and this system survives up to the present day, being really regulated private vengeance. Exceptions may be found in the case of offences against the security of the State, and to some extent highway robbery, especially in cases where the Government has organized an expedition for its repression. The system then is that the aggrieved party asks for vengeance, and this he gets in the case of homicide by the life of the killer (which the Fetha Nagast seems to contemplate for the most part), or by a money compensation, at his option. In other cases, for instance theft, the damage done to him is the deprivation of his property, and therefore he demands the property back, and possibly damages for its detention, etc. (In quite modern times there has been some tendency towards the development of the idea of a penalty to be paid also to the Government in certain cases.) As the procedure followed is practically the same as in an ordinary money claim, it is not surprising that the law does not interest itself greatly with the distinction between crimes and torts, and in the following discussion the term "offences" is used to include both.

Regarding offences by third parties with reference to the slave, these may either be directly against the master, as by stealing the slave, or inciting him or helping him to run away; or they may be directly against the slave, and thus indirectly against the master. As to the first the Fetha Nagast says that if a man instigates another man's slave to run away, or conceals him, etc., he is liable to restore the slave, plus another slave like him, or his price; and that if he is unable to pay this compensation, he has himself to serve the other as a slave until he has worked off the amount of the compensation: that is to say, theft of a slave was punishable to the same extent as theft of an animal. In a similar way a reward was due from the owner to the man who brought back a runaway slave or straying animal. As regards offences against the slave, the rule of the Fetha Nagast is that, if a man damages the body of a free man, he must pay medical expenses, etc., but nothing for disfigurement, since the body of a free man cannot be estimated in terms of money; but if he damages the body of a slave, he must pay any expenses occasioned, and also damages for any depreciation in the value of the slave. In modern law in the case of stealing, etc., of the slave, the owner usually gets his slave back, and the Government punishes the thief; but in the case of injuries to the slave, the old law is still in vigour, and the master can claim damages in all cases, even for a light blow by a third party. In this connexion it may be noted that if a third party seduces a female slave, the master has no action for damages, though he has if the seduction amounted to rape.

We pass now to the consideration of the question of offences by the slave against third parties. Here we find very little in the Fetha Nagast. It is there said that if a man owns a slave who is a thief, he must pay the value of the things stolen, but if he is not willing to pay, he must hand the slave to the aggrieved party, whose absolute property the slave then becomes; and further, that if a man owns a dangerous slave (or animal) and does not look after him, and he kills someone, the master is responsible (for damages) for involuntary homicide; but that if the master does not know the character of the slave, he is not responsible. The principle is more or less the same at the present day, with the important exception that the slave if surrendered by the master does not automatically become the property of the accuser. As we shall see, he is now regarded as having been freed by the surrender, and the case goes on in the court between him and the accuser. If he is acquitted, he leaves the court a free man; and if he is convicted, he will be punished by death or imprisonment, in the latter case being absolutely free after he has served the sentence imposed.

The modern law depends largely on the appreciation of the court, and may be stated as follows: (1) If the slave is accused by a third party, and the master defends him, the master is financially responsible for the amount of the judgment. (2) If the master does not wish to defend, and offers to surrender the slave, (*a*) the court may compel him to defend in the case of a casual offence not of a heinous character by a slave normally of good character, (*b*) in the case of a slave of bad character the master can surrender him, and thus put an end to the matter as far as he is concerned, except that (*c*) if the slave were of such a bad character as to be a public danger, the master might be held liable for having kept a dangerous thing not under proper control. A few examples may help to make the matter clear: A slave of excellent character has a casual quarrel with a man, and kills him in a fight—the master is responsible. A slave of excellent character commits a deliberate murder—the master can surrender him. A slave who is a drunkard and a disreputable character commits an offence—the master can surrender him. A slave who is known to be dangerous, and has repeatedly violently robbed people, is left at large by his master, and commits an offence—the master may be held responsible: not so, if he had properly confined the slave, and the slave without his fault had escaped. It is difficult to state the law more precisely, since so much will depend on the view which the court, composed mostly of people from the neighbourhood in question, takes of the facts of the case. It may be noted that a man who receives property stolen by a slave is liable to a greater degree than if he received from a free thief.

But it may be that the master has ordered his slave to commit the offence. In this case the Fetha Nagast says: if a master forces his slave to kill, the master and not the slave is responsible. This is still the modern law, the word " force " being taken to include a mere order, since a slave is bound to obey his master. The rule applies to all offences including murder. Needless to say the slave will have to prove that he acted under the orders of his master, which may be difficult, since the master is not likely to have given written authority. Still in such a case he can produce witnesses, if he has any. The fact that the offence was committed for the benefit of, though without the orders of his master, will not increase the normal responsibility of the master.

There remains the question of the mutual relations of master and slave. It was always, and still is the law that the master is responsible for the maintenance of his slave. The Fetha Nagast does not refer directly to the matter, but in dealing with the question of the deposit of a slave (or be it noted of an animal) it says that if the depositee does not feed him and he dies, he is responsible ; and further that even if the depositor orders him not to feed the slave, etc., but the depositee does so, he can charge the depositor with the cost, and if he refuses to pay it, the slave ceases to be a deposit and becomes a pledge for the amount due. The responsibility mentioned in this passage is probably merely civil responsibility to the depositor for the value ; but in view of this passage, and of others where penalties are imposed on the master for killing the slave, it may be inferred that the master could not lawfully kill him by neglect. In modern times failure to maintain would be a ground for the slave to claim his freedom, and if he dies from neglect the master would be liable for homicide. As regards the punishment which might lawfully be inflicted by the master, the Fetha Nagast says that if a master beats his male or female slave with a big stick, and the slave dies under the blows, the master is liable to capital punishment, but if the slave lives a day or two, the master shall not be punished with death, since the slave is his property. Further, if a master flogs his slave with a thong or a small stick, and death results, the master is not liable to punishment, but if he flogged him very severely, or poisoned him, or burnt him with fire, he is liable for homicide. At the present day the law is in principle the same. A master has still the right to flog his slave within the above limits, or to keep him in chains. At the same time, the modern tendency, as we shall see later, is for ill-treatment of this nature to be more and more regarded as a reason for the slave to claim his freedom. This punishment of the master who kills his slave is a primitive example of action taken by the State, since obviously the slave who was killed could not take action, and presumably his relatives could not either, since they, being normally slaves also, were not free to bring a suit. At the present time the Government conducts the prosecution, and in theory at any rate no compensation of the death penalty can be made, since there is no interested party to compound : in practice, however, the Government often accepts a money penalty in lieu of the death sentence. This is, however, against the strict law.

If the master considers that the offence committed by his slave cannot adequately be punished by himself, he should take him to court for adequate punishment to be awarded. If, says the Fetha Nagast, a slave is guilty of a fault deserving death, the master shall take him to the judge for condemnation, and if the master kills him himself (*i.e.* without the order of the judge), he is liable to capital punishment. This is still the rule, as is also the provision that a slave who kills his master, or attempts to do so, or who fails to rescue him knowingly when he is attacked, or who plots against the life of his master (unless the plot is for the benefit of the

State) is liable to the appropriate punishment, in most cases death. The old law also contained special provisions relating to the special liability of a freed slave who committed a crime against the life of his late master: at the present day he is liable like any other free man. There is, however, one important modification in the modern law with regard to an accusation by the master against his slave. By making the accusation, the master is regarded as having abandoned or freed his slave. Thus if the slave is acquitted, he is a free man; and if he is condemned to imprisonment, he does not return to his master as a slave after he has served his sentence.

Many of the above matters can now conveniently be reconsidered from another point of view in a discussion of the question of the legal rights and liabilities of slaves. The general principle is enunciated in the Fetha Nagast as follows: An accusation (*i.e.* civil or criminal) can only be made by a man who is free to dispose of the thing about which he accuses—hence a slave or a child cannot accuse. In like manner a man can only be accused who is free to dispose of the thing about which he is accused. The meaning of this rule is plain, namely that a slave cannot either make a case, or have a case brought against him. With regard to the right of a slave to bring a case, the only absolute exception both in the ancient and the modern law would appear to be his right in certain cases to take proceedings to assert his freedom. A consideration of this matter may be postponed till later, when the general question of the acquisition of freedom is discussed. It is also mentioned in the Fetha Nagast that a female slave is protected against rape like a free woman. No further details are mentioned, and it is probable that this only means that the master has a right of action if she is raped. Thus the position in the old law was that the master, and the master only, had the right of action—the slave was totally unable to set the law in motion. The modern practice is much to the same effect. Either the master brings the case, or the slave is allowed to do so, provided he has the consent of his master. He therefore sues as X the slave of Y, and with his consent. Anything obtained from the case would go in the first place to the slave, subject to the right of the master to take possession of it at any time, as in the case of other property. If the master refuses his consent—which he might well do, for instance, if a friend of his had beaten his slave—the slave is unable to bring a case for a wrong done to him, and is without any remedy, except possibly that if the refusal of the master was in a matter serious enough to amount to cruelty, the slave could claim his freedom on that ground. Of course the slave cannot bring a case against his master; the punishment of the master for killing his slave is no exception to this rule, for the case is not brought by the slave or his relatives, but by the State. A master is also severely punished for mutilating his slave, and especially for making him an eunuch. In this case also the State brings the case, but the slave would also be able to set the law in motion by claiming his freedom on account of the mutilation. At the present day a master can make a case on account of the rape of his female slave, or authorize the slave to do so, but the slave is apparently without remedy if raped by her master.

The rule of the Fetha Nagast that a slave could not be sued was all very well in the old days when communities were small, and everyone knew whose slave the man in question was, and the case could therefore be made at once without difficulty against the master. This practice still prevails in the interior at the present time, but in towns the case usually is commenced against the slave himself, and this is the more natural since by Abyssinian procedure a case is commenced not by a written plaint, but by the arrest of the defendant, and bringing him before the court. On the production of the slave before the court it is usually quickly discovered that he is a slave, and who his master is, and then the master is called on to appear. The master then has the option to defend or not, as has been stated above. If the master does not defend, and he gets out of his liability by surrendering the slave, the slave is considered to have been freed, and he is then entitled to continue the defence of the action himself. The slave too has the right of pleading that he acted under the orders of his master, and he is allowed to bring proof of this if the master denies it; and this must have been the rule also under the old law, otherwise the provision of the Fetha Nagast that the slave is not responsible if forced by his master to kill is of little value. In cases of contract, where the slave has no authority from his master to contract, the master would merely plead this defence (the onus of proof of authority being on the plaintiff), and the slave would then be allowed to defend the action himself. As in the case of an admission, if judgment is given against him he must pay out of his earnings, or if he has none, he has to pay if subsequently he becomes free. The creditor cannot seize the body of the slave in execution, as he could do in the case of a free man, for he himself is at fault for having contracted with a slave. As we have seen, the slave surrendered by his master for an offence is considered to have been freed, and he is judged and acquitted or condemned as a free man. So too is the slave considered to have been freed, if the master instead of punishing him himself makes a case against him in court, and this he is bound to do if he wishes to have inflicted a greater punishment than flogging or chains: and a prudent master would take this course in the case of a criminal slave in order to get rid of him, rather than simply to free him and turn him adrift, since if he took the latter course he might incur some degree of responsibility from having loosed on the public a man who was a public danger.

The last matter for discussion in connexion with the position of a slave as a chattel is the most important one of the transfer of the slave, either *inter vivos*, whether permanently or for a specific purpose such as pledge, or by inheritance or will. It is in this branch of the law that we find the greatest divergence between the law of the Fetha Nagast and the modern law, and again between the modern law as it is in theory and the practice which has, until recent legislation, stifled the law. The divergence concerns the question as to what slaves can be transferred at all, and to whom they can be transferred. In the Fetha Nagast there was little restriction on the master's rights of transfer, but he was forbidden to sell a slave who was a believer (interpreted as orthodox Christian) to a non-believer, or to a person of totally different habits from the slave. He was further forbidden to sell his own children by a slave woman, or to sell a slave who came to work for him of his own free will. In the case of his death, his slaves passed under his will or by intestacy like any other chattels, subject to the above restrictions. From an early date, however, the custom grew up and obtained the force of law to the effect that a Christian slave could not be sold or otherwise transferred *inter vivos* at all, and that on the death of the master, he could not be left by will to outsiders, but descended to the heirs. We have already seen that it was incumbent on a master to compel the conversion of non-Christian slaves, and this he could do by force. Hence for the most part the slaves owned in the country were Christians, and legally could not be transferred. There were of course a certain number of masters who were themselves heathen, but it was early established that they were absolutely incapable of owning Christian slaves. The question of Jewish masters or slaves need not detain us, since the only native Jews in the country are the Falashas, who do not own slaves, and have not been enslaved. The matter of Moslem masters and slaves has only become of importance since the extensive conquests of the emperor Menelik. In early times there were few, if any, Abyssinian Moslems, and Moslem captives were doubtless offered the choice of conversion or death. As the result, however, of the conquests of Menelik vast areas of territory were brought under Abyssinian rule, and in many cases the conquered rulers, many of whom were Moslems, were allowed to continue to govern their territory under the suzerainty of the Abyssinian Emperor, and this without changing their religion. Hence the problem arose as to the position of Moslem masters and of Moslem slaves. Regarding the first it was held that they like heathen were incapable of owning Christian slaves. They could, however, own Moslem or heathen slaves, with whom they were more or less permitted to regulate their relations according to the precepts of the Moslem law. Moslem slaves who found their way into the hands of Christians were doubtless converted whenever possible, but the rule as to forcible conversion was not applied as strictly in their case as in that of heathen. Hence the only slaves legally capable of transfer were Moslems and heathen.

To sum up the position, it may be said that from early days it had been established by custom having absolutely the force of law that Christian slaves could not be transferred at all (except on the death of the master to the lawful heirs); that non-Christian masters could not own Christian slaves; and that if a slave was illegally transferred, or found himself owned by a non-Christian master, he could claim his freedom.

There is no doubt that this custom formed part of the law of the land,

and cases are recorded in the time of the Emperor John where slaves were illegally transferred, and in consequence successfully asserted their freedom. However, the course of justice in Abyssinia is not too pure, and the masters had the upper hand, and in practice Christian slaves were constantly transferred in defiance of the law. Proclamations of Theodore, John and Menelik endeavoured to enforce the law on this point without great success, and the matter was rendered still more difficult by the great increase in the number of slaves owing to the conquests of Menelik, and to their recruitment by slave raiding in the disturbed times of his successor Lij Yassou. As will be seen below the legislation of the present Emperor Hailie Selassie I restores and extends the restrictions on transfer.

We can now consider the law governing the transfer of slaves, applicable in such cases where transfer is lawful. The Fetha Nagast laid down that the price of a slave was like that of any other chattels at a given time : it increases if he is clever and industrious, or decreases if he is good for nothing, or as he grows older. A transfer of a slave *inter vivos* was effected like that of other chattels, that is to say by an actual handing over, or by a declaration of transfer, and hence a slave in flight could not be sold. When the purchase was complete, the risk passed to the buyer ; if the slave was sold under a guarantee, the purchaser could rescind the contract if the slave was not in accordance with the guarantee ; the buyer could also rescind within six months of the contract in the case of hidden defects, and he could also claim compensation if he had suffered damage ; but if the seller had pointed out the defects at the time of sale, he was not responsible. If the slave runs away within six months, the loss is on the buyer if he has not guarded him well, otherwise it is on the seller. If after the buyer finds out the defect he frees the slave, or gives him as alms, or gives him away or sells him, the seller is no longer responsible. Further, if he bought him from an infidel and baptized him, or if the slave was a believing female and the buyer married her himself, or married her to a believer, he cannot return the slave to the seller on discovering a hidden defect. If a mother was sold, a child conceived but not born passed with her, and neither could be sold separately. The ordinary rule for contracts made under compulsion was that they could be rescinded at the option of the party who was constrained—this applies also to the sale of a slave, but it is specially provided that if a man was forced to buy a slave, not only could he rescind the contract, but the seller was liable to him for the misdoings of the slave, and also if he ran away. An exception was if a man forced another to sell him a female slave, and then married her himself, or to someone else : in this case the seller cannot rescind the sale, but the buyer is liable to make up to him the full price. Also if a man was forced to free a slave, or to give him as alms, etc., the transaction cannot be annulled, but the person forced can obtain compensation. If a man takes possession of a slave or other chattel and improves it, he must pay to the owner the price before the improvements were effected, or the owner can take it back, on paying the cost of the improvements.

All the above is for the most part the ordinary law of the sale of chattels—in fact, when disscussing sales, the Fetha Nagast often mentions a slave as being the typical example of property. At the present day the law is still applicable to the sale of slaves, in such cases where a sale at all is lawful. A slave in cases where he can be lawfully transferred can of course be pledged for a debt, deposited for safe custody, hired out, etc., etc. It is unnecessary, however, to go into the details of these transactions, the law being practically the same as in the case of animals.

In the case of the death of the master, slaves who cannot be transferred descend to his heirs, whilst those capable of transfer either descend to the heirs or go to the beneficiaries under the will of the deceased. The law applicable for the most part is the ordinary law governing intestacy and wills, which applies to slaves like other chattels. It may be remarked in passing that although a female slave cannot be sold without the child which she has conceived, either may be left by will apart from the other, but if nothing is expressly stated, they both pass. A word here may be said regarding the question of the separation of the slave from his wife or his family, since through humanitarian reasons the ordinary law as to transfer of chattels was modified with regard to slaves on this point. The matter might arise not only if it were a question of selling the slave, or of his transfer under a will or on intestacy, but also in the case of a divorce between his master and mistress. From the somewhat contradictory statements contained in the Fetha Nagast we may gather that the law allowed separation except in the case of a female slave and her child before he was weaned, but that there was a tendency against such separations. Thus we read in certain cases of separation of a master from his wife, the wife takes back her " outfit," that is to say certain property which she brought with her ; but that of the young born to slaves and animals in her outfit, half goes to her, and the other half to her husband. A similar rule prevailed in certain cases with regard to the young of animals and slaves in the wife's dowry. On the other hand it is stated that it is not good to sell a female slave apart from her little child, especially before he has grown up ; and further that it is not good to separate the slave from his brother, his wife, or his child. This, however, appears to be an expression of opinion as to what the law should be, rather than a statement of the law itself. However that may be, the modern law is quite clear to the effect that in cases where a slave can legally be sold, he can be sold apart from his wife or children, an exception being in the case of the sale of a female slave, that her children up to the age of about seven years must go with her. In the same way the wife or children can be sold apart from the husband slave. With regard to the bequest of a slave by will, the terms of the will will be followed, and it is a matter of construction to determine whether the bequest of a slave includes or not his wife and family. There is no presumption either way.

**Enslavement.**—" At the beginning of creation," says the Fetha Nagast, " all men were free, but war and raids bring them to serve others, since the law of war is that conquest makes the conquered slaves of the conquerors." In days gone by war was a fruitful source for the recruitment of slaves, the last instance being the conquests of Menelik. Raids for slaves into foreign territory undoubtedly occur even at the present day, but they are quite illegal, the offenders being liable to severe punishment, and the persons captured being in no way regarded legally as slaves. We find in the Fetha Nagast heavy penalties, usually death, based on the Mosaic law which is expressly quoted, imposed on those who steal or who abet the stealing of free men, and utilize or sell them as slaves. This is still the modern law, as is also a provision which makes it a punishable offence to buy knowingly as a slave a man who has been freed, or to sell him, or to transfer him in any other way. The Fetha Nagast also made the stealing of children, whether free or slaves, punishable with death; but as this is mentioned in a string of offences such as sacking the country and robbery generally, it is probably merely a punishment for robbery with violence, and has no special interest to the law of slaves. Probably then as now a simple theft of a slave was punishable like the theft of any other chattel.

A second possible manner of enslavement mentioned in the Fetha Nagast is the case where either a free man or a freed slave admits that he is the slave of somebody. In this case, if in consequence he is sold or otherwise transferred, he becomes in fact a slave, provided he is over twenty years old, otherwise he is to be freed by the judge or governor. The modern law is probably the same, but the case does not often occur.

The last and most important manner of enslavement is that of birth. The general principle is that children of a female slave are born the slaves of her master, whereas the children of a free or freed woman are free, and this irrespective of the status of the father. The Fetha Nagast has a provision that the children of a male slave are the property of his master, irrespective of the status of the mother. This rule, however, as it stands cannot have been the law, since if the children were born from a woman slave belonging to another master, they would by the general rule belong to her master, and not to the master of the male slave. So also if the mother were a free woman, the children must have been free, unless she was living in the house of the slave as his wife, in which case the children certainly became the slaves of his master, and this is the modern rule. In like manner the provision of the Fetha Nagast that the children of a free woman by a slave father do not inherit her property, even though the father subsequently becomes free and on her death inherits a share in her property according to law, must be limited to the case where she was living with him in his house as his wife. If a female slave is freed whilst pregnant, the child is born free: and further the child of a free woman is born free, even if she in some manner becomes a slave after conception, but before the birth. If a man owns a slave who is married to his female slave, and has children by her, and the master frees the male slave, the wife and children remain the slaves of the master; but by modern practice the slave is entitled to claim freedom for his wife and children, which the court will award, if it is considered that he is a deserving case, for example if he has been freed for faithful service, etc.; it would be otherwise if he had been freed because he was worthless and the master desired to get rid of him. If a free man cohabited with someone else's slave and had children by her, the children are of course the slaves of her master, but at the present day the father is entitled to claim them on paying money compensation to her master. Under the law of the Fetha Nagast, if a man cohabited with his own slave and had children by her, the children were slaves (unless he freed them), but he was not allowed to sell them. At the present day the matter depends on whether he is married or not. If an unmarried man cohabits (as distinct from casual intercourse) with his slave, the children are born free. If he is married and has children by his slave, the matter stands as in the case of a casual connexion in the above case, namely, if he recognizes the children as his they are free; if not, they are slaves. Finally the rule of the Fetha Nagast may be mentioned to the effect that if a child is found lost or straying, the presumption is that it is born from free parents, " since freedom is the primitive condition of man," the only exception being if there are no believers living in the place where the child is found; which rather appears to show that the Fetha Nagast considered all non-believers as slaves! At the present day legally the child would be presumed to be free.

Before leaving this topic a word may be said as to certain conditions which are sometimes referred to as slavery. For example, it is sometimes said that a judgment debtor, if he cannot pay, becomes the slave of the plaintiff, until he has worked off the amount which he owes. This, however, is not the case. His position may resemble that of a slave, but nevertheless his status is that of a free man, and his children are born free. So too persons condemned by the Government for crimes and imprisoned or put to forced labour are sometimes referred to as slaves; but such are prisoners and not slaves.

**Manumission.**—Manumission or freeing of the slave can take place either by the will of the master or in some cases without it. The Fetha Nagast states that a master frees a slave by " leaving him," that is by stating either in writing, or before the bishop, or the priest, or three witnesses that he leaves him as a free man. At the present time the method is the same, the freeing being effected usually by writing, or before witnesses, or, under the recent legislation, before the newly constituted slavery courts. The master when he frees the slave can fix a condition, as for instance that the slave shall continue to serve him or his heirs for a stated period; but if the condition was that the slave should continue to serve as a slave for the rest of his life, the slave would not be freed, since in fact there is no gift of freedom. If the master merely promises to free the slave after a given time, he can sell the slave before that time comes, and if he subsequently rebuys the slave, the promise to free is no longer in force. If the given time in fact arrives, and the slave has not left his service in the meantime, the slave can claim his freedom. The reasons for freeing are quite immaterial as regards the point whether or not the slave becomes free. It is stated generally in the Fetha Nagast that a man cannot free his slave, who at the time was in the possession of another. At the same time it is stated that in the case of a pledge of a slave, the pledgor can free the slave, provided he is able to repay the debt or to give something of equal value to the pledgee in the place of the slave so freed. At the present day neither the pledgor nor of course the pledgee can free a slave pledged during the existence of the pledge, otherwise than by mutual agreement.

The granting of freedom is stated repeatedly in the Fetha Nagast to be a meritorious act and the highest form of alms, and we find many provisions in favour of freedom. For example, a child at the breast can be freed without freeing the mother; if two men own a slave in common, one co-owner can free his part without the consent of the other, and he has the right of pre-emption of the part of the other with the view of freeing the slave entirely, whereas in general one co-owner can do nothing to the property held in common without the consent of the other. In the same way if a man steals a slave and frees him, or if in the case of a female slave he marries her himself or to someone else, the transactions are valid, but of course the thief must compensate the owner: and so too if a man leases a slave with land, and then frees him, this is valid, but he must compensate the lessee. All this is good law at the present day. Further, as mentioned above, at the present day a slave becomes free from his master if the master surrenders him to his accuser: and also if the master makes a case against him in court in order to have him punished by the Government.

In addition to formal manumission during his life, a master can free all his slaves or a particular slave or slaves by will, and the gift of freedom is good. This matter is regulated by the ordinary law of wills and inheritance, and calls for no special comment.

In the case of a man dying intestate and without heirs, his property goes to the State, or in the case of certain clerics to the church. In this case any slaves in the inheritance became free, the Fetha Nagast giving as the reason "since the King is the father of his subjects including slaves, and the child cannot be the slave of his father." At the present day both the State and the church can and do own slaves, and in such a case the slaves would probably not become free.

The Fetha Nagast gives various reasons which entitle the slave to his freedom, apart from the will of his master. It is stated on the authority of the Mosaic law, that if a man owns a slave, he shall free him after seven years' service; and there is also a provision (the text is somewhat corrupt) which says that if a man inherits a slave from certain relatives he shall free him. It is unlikely that either of these provisions was followed in practice. At the present day there is a sort of idea current, attributed to the Fetha Nagast, that if a man inherits a slave, he shall free him after seven years' service, but this is not followed in practice, and in modern law there is no provision for the compulsory granting of freedom after so many years of service. The other compulsory reasons for freeing a slave given in the Fetha Nagast are still in force, and they are as follows: If a man strikes out the eye of his slave (now interpreted as breaking any limb or inflicting grave injury); if the master, his wife or daughter became godparent to the slave on his baptism; if the slave becomes a priest with the permission of his master; if the master makes the slave a soldier; if the slave is captured by the enemy and later returns of his own free will to his master; and if the slave saves the life of his master. A curious case recognized in modern law may be mentioned. If an unmarried man cohabits with his slave and has children by her, and then he marries someone else, the slave becomes free (we have already seen that the children were born free), and in addition she takes half his property, as would do a lawful wife in the case of a divorce in normal circumstances.

As regards the cases in which a man should not free his slave, the Fetha Nagast only says that he should not do so unless the slave has means for his support. At the present day the master can free such a slave, but he is still liable to support him, except in the case of a thoroughly bad slave whom the master can free and turn out, even if he has no means of support.

The Fetha Nagast allows an ex-master, by the order of the judge, to re-enslave the slave whom he has freed, if the slave fails to render the services which he has promised to perform at the time when he was freed; or if he abuses or beats his late master or his children, or attempts to do harm to his life or property. At the present day re-enslavement is in no case possible, the master having simply the ordinary remedies for breach of contract or for the wrong done. The fact that the accused was a former slave of the accuser would probably carry weight with the court in giving judgment.

Questions affecting freedom constitute the big exception to the general rule that a slave cannot bring an action in court. At the time of the Fetha Nagast it is probable that a slave, if there was a *prima facie* doubt as to whether or not he was a slave, could bring the matter before the court for decision. Then too we have the case where a master promised freedom to his slave at a given time, and the slave remained in his service till that time, but the master refused to free him. In this case presumably the slave had the right to bring the matter before the court. In modern law the rights of the slave have been greatly extended. Thus if a master fails to maintain him, or ill-treats him, even if the ill-treatment is not sufficiently grave as to entitle *ipso facto* the slave to freedom, or fails to protect him against others to such an extent as to amount to ill-treatment, in these cases the slave can apply to the court to be declared free. So too, as we have seen, in view of the fact that a Christian slave cannot legally be transferred at all, except by inheritance, either absolutely or temporarily as in the case of pledge, a slave so transferred can apply to the court to obtain his freedom, as also he can do if he comes into the hands of a non-Christian master. Such is the law, but in order to consider the matter in due perspective one must not lose sight of the fact that a master who was accustomed to ill-treat his slave, or a creditor who held a slave as a pledge, or the purchaser of a slave, would probably take precautions either by chaining or otherwise confining the slave, in order to prevent him from applying to the court. These rules as to the assertion of his freedom by a slave have received considerable extension by the legislation of the present Emperor.

**The Legislation of the Emperor Haile Selassie I.**—Immediately prior to his visit to Europe in 1924, the present Emperor, who at that time was Ras Tafari Makonnen, issued a law dated March 31, consolidating and amending former legislation regarding slaves. This law was amended by another law of July 15, 1931. This legislation provides for the registration of all slaves in the country, and sets up special courts, to be inspected and checked by government inspectors for the hearing of cases between slaves and their masters, and generally affecting questions of freedom. A part of the law merely confirms what was already the law of the land, but which had not always been followed strictly, especially in the more remote districts, where the officials and judges were under very slight control of the central government. These officials and judges were for the most part slave owners, and thus it is not surprising that they had not taken a liberal view of the rights of slaves. Under this head come provisions enacting that the following slaves shall be free : those to whom their masters had been godparents in baptism ; those who had been made clerics or officers in the army ; those who had fought as soldiers against the enemy ; and those who had saved their masters' lives. It was also definitely laid down that if a slave was ill-treated or neglected by his master, he could bring the matter before the special slavery courts, which, if the case were proved, would for the first offence warn the master, and for the second would free the slave. So too it was provided, more or less confirming the existing practice, that female slaves who had borne children to their masters, or to their masters' sons, were to be free ; that if a slave was freed for good service, his children also were to be free ; and that slaves were to be free who had been treated as favourites. The other provisions regarding freedom are new, and some are of very great importance. To deal with those of lesser importance first, it was enacted that in the case of a divorce between the master and wife, the slaves should have the option as to which party they would go with, and were not to be divided up like cattle ; that slaves who had become such on account of having been taken prisoner in war were to become free on the death of their masters ; that runaway slaves were not to be arrested by persons other than their masters, or competent officials, and that if such other persons did arrest them, they were not to receive a reward for so doing ; that a master who arrested his runaway slave must under penalty of a fine take him before the slavery court for the matter to be inquired into, before he took him back to his house ; that runaway slaves arrested at customs posts or at the frontier were to become free, if not claimed within eight days; that a master, who before the date of the proclamation had handed his slave over to another man for any purpose (*e.g.* pledge), could not for any reason seize him, and get him back; and that all children born of women slaves by a free father were to be free.

There remain three other provisions, which are of the very greatest importance, and which will have the effect, if they are genuinely applied, of abolishing slavery absolutely in Abyssinia within the course of a generation. In the first place, the transfer after the date of the law of 1924, whether to a relation or to a stranger, and whether for consideration or gratuitously, of any slave, Christian or non-Christian, was completely forbidden (except by way of inheritance), and any slave so transferred becomes at once free, and by the amending law of 1931 both the transferor and the transferee are liable to penalties. Secondly, any slave who was inherited after the date of the law of 1924 was to serve for seven years from the date of the death of his master, and was then to become free. By the law of 1931 the service for seven years was abolished, and the slave was to become free immediately on the death of his master, or at most within one year from the death, if he had at that time work in hand to complete, or accounts to render. Lastly it was provided that all children born of slaves after the date of the law of 1924 were to be born free.

Penalties ranging up to fifteen years' imprisonment and fines, and for a second offence imprisonment for life, were imposed on those buying or selling slaves after the date of the law, or re-enslaving by false pretences or fraud slaves who had been freed; and penalties were also imposed on the various officials in districts where it was proved that such offences had been committed. It was also made an offence punishable with a small fine to call by the name of slave a slave who had been freed.

With regard to slaves who obtained freedom after the date of the law, it was provided that they should be registered and granted certificates of freedom, that they should be absorbed as far as possible in the general population, that they should be exempt from all taxes for seven years in order to enable them to make a start in life, and that schools were to be established to train ex-slave children in useful trades and professions. It was further expressly laid down that if a freed slave committed an offence, he was to be punishable like a free man, and was in no case to be re-enslaved.

**Conclusion.**—If one considers the rights and liabilities of a slave as contained in the law of Abyssinia, it cannot be said that his lot is a hard one. The master is compelled to house, feed and clothe him. His work for the most part is of a domestic or agricultural nature, and is no more arduous than that performed by a free servant or labourer. It is true that the master has the right to chain or flog him, but in Abyssinia a large part of the free population are frequently in chains; and in any case an abuse of his powers by the master would entitle the slave to take steps to assert his freedom. So much for the position under the law. Inasmuch, however, as in Abyssinia the law regarding slavery as well as in other departments is by no means strictly followed, it is undoubted that in many cases the slave is deprived by practical considerations of his rights under the law, and in some cases is hardly treated. As has been seen, in the past repeated attempts have been made by proclamations to enforce the observance of the law of the country; but as so often happens in Abyssinia, after a temporary flicker of activity, the proclamations have become a dead letter. The state of the law as it stands at present is sufficient not only to protect the slave, but also to terminate slavery completely within a generation. Especially of late, an attempt has been made to put the new reforms into force, and fifty-six special judges to deal exclusively with questions of slavery have been appointed in the provinces, whilst in the capital a central department to deal with slavery has been set up together with a special slavery court, and a court of appeal for matters concerning slaves. A considerable number of slaves have been declared free, and duly registered as such, and an attempt is being made to find them a means of livelihood and to absorb them into the free population of the country.

The law, then, is sufficient. Time only can show whether it will be enforced continuously, or whether, like the law forbidding the transfer of Christian slaves, it will become overlaid in practice by customs, undoubtedly illegal, but tolerated by the authorities.

# THE LEGAL INTERPRETATION OF AN INDIRECT TAX.

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THE law courts are very familiar with the registered medical practitioner, the alienist, the Home Office pathologist, the handwriting expert, the firearms manufacturer, the exponent of foreign law, and a host of other professional witnesses called to give testimony on points upon which knowledge of sciences many of them less exact than economic science has a remote bearing. But, happily, or unhappily, the spectacle has never been seen of a witness being called into the box and asked, " Are you a professional economist ? Please state your qualifications," and then asked what in his opinion would be the economic effect of a certain Act or regulation made under it, or whether its effect is correctly described by a recognized technical term as used in economic science.

Although in considering the validity of contracts in restraint of trade as opposed to public policy, works of political economy (understood to be of accepted repute) are not infrequently quoted in the law courts, the subject upon which political economy has the most direct and far-reaching bearing is in the classification of taxes into direct and indirect categories where by the provisions of a Federal constitution indirect taxes are placed under the sole control of the Federal legislature, or where under a central form of government such as is embodied in the South Africa Act, 1909, the Provincial legislatures have powers of taxation strictly limited to direct taxation.

**Interpretation in Canada.**—The British North America Act, 1867, allocates to the Provincial legislatures under s. 92 (7) " Shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes," while under s. 91 (3) the Dominion Parliament may pass Acts for " the raising of money by any mode or system of taxation."

Under these two headings have arisen a series of constitutional cases where the Dominion Government has sought to restrict the powers of Provinces to tax certain forms of property under the attempted application of the American doctrine of immunity of Federal instrumentalities, and in other cases the Provincial legislatures by adopting some form of machinery for collection hitherto associated with direct taxation have sought to encroach upon the field of indirect taxation from which by the provisions of the Canadian Constitution they have been expressly excluded.

In the first of these cases, *A.-G. Quebec* v. *Queen Insurance Co.*,[1] the Quebec Legislature had passed a licence Act under which an insurance company doing business within the Province was not obliged to take out a licence, but had to affix an adhesive stamp to be paid in respect of each transaction, not by the insurance company but by the assurer who took out the policy. The Act made insurance policies not so stamped inadmissible in evidence within the Province. The Act was obviously an attempt to tap the Federal sources of indirect taxation under guise of a licensing Act, which on the face of it would be *intra vires* the Provincial legislature. Sir G. Jessell M.R., in holding the Act to be *ultra vires* the Quebec Legislature, there said (at p. 1098) :

> Now the first point which strikes their Lordships, and will strike everyone, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a licensing Act, but the licensee is not compelled to pay anything for the licence, and, what is more singular, is not compelled to take out the licence because there is no penalty at all upon the licensee for not taking out the licence : and further that, if the policies are issued with the stamp, they appear to be valid, although no licence has been taken out at all. The result therefore is that a licence is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take, which is certainly a singular thing to be stated of a licence. They say on the face of the statute, "The price of each licence shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because without that no policy can be obtained. It may be that the company buys the adhesive stamps and affixes them, or pays an officer of the company the money necessary to purchase them and affix them : but whoever does so complies with the Act.

The Privy Council Board accordingly held that the licence tax was an indirect tax and invalid as such. They did not, however, lay down any general principles as to how a " direct " as distinct from an " indirect " tax was to be defined. In *Bank of Toronto* v. *Lambe*[2] that was done by Lord Hobhouse. There a number of banks including the appellant bank had been formed under a law passed by the Dominion Parliament in 1855, and had since built up a system of branches throughout Canada. In 1882 the Quebec Legislature passed an Act which purported to impose a tax upon banks, insurance companies and other corporations. In the case of banks the tax varied with the paid-up capital and an additional sum had to be paid for each office or place of business. The amount of the bank's capital belonging to persons resident in the Province of Quebec and the amount disposable for the Montreal agency were respectively much less than the amount belonging to other persons and the amount disposable elsewhere. The tax was held invalid by the Canadian Supreme Court on the grounds : that the tax was indirect ; that it was not imposed within the limits of the Province ; that the Dominion Parliament has exclusive power to regulate banks; that the Provincial legislature can tax only that which exists by their authority or is introduced by their permission; that if the power to tax such banks existed, they might be crushed out by it, and so the power of the Dominion Parliament to create them might be nullified. The Board of the Privy Council reversed the decision of the Canadian Supreme Court and refused to apply the doctrine of immunity of Federal instrumentalities laid down by Chief Justice Marshall in the very similar American case *McCulloch* v. *Maryland*,[1] and paid no heed to Marshall's much-quoted *dicta* "the power to tax includes the power to destroy." Lord Hobhouse said (at p. 581):

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[1] (1878) 3 A.C. 1090.

[2] (1887) 12 A.C. 575.

> First, is the tax a direct tax? For the argument of this question the opinions of a great many writers of political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz. what the words mean, as used in this statute: whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct" and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the tax-payers or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it: and of every direct tax that it affects persons other than the first payers: and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

Lord Hobhouse preferred as a working definition that given by John Stuart Mill in his *Principles of Political Economy*, Book V, Chapter V:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such are the excise or customs.
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> The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price. [Lord Hobhouse continued:]

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[1] (1819) 4 Wheaton 316.

It is said that Mill adds a term—that to be strictly direct a tax must be general ; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point : nor would they presume to say whether for economical purposes such a condition is sound or unsound ; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income-tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind ; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the Appellant's counsel, not only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

In spite of the growth of economic science the definitions of John Stuart Mill cited above are still the accepted tests. Although excise revenue is an indirect form of taxation within the scope of Dominion legislation, a provincial law is not invalid because its enforcement will diminish Dominion revenue by restricting the sale of liquor. Thus in *A.-G. Manitoba* v. *Manitoba Licence Holders' Association* [1] a very stringent temperance law, the Manitoba Liquor Act, 1900, for the suppression of the liquor traffic in that Province was held valid (it being admitted that after the judgment of the Privy Council given by Lord Watson in *A.-G. Ontario* v. *A.-G. Dominion* [2] that Provincial legislatures have concurrent jurisdiction with the Dominion over the drink question) though the effect of such Provincial liquor legislation might be seriously to reduce the Dominion revenue. But Provincial taxation upon the transmission of moveable property outside the particular Province is on the face of it bad.[3] In contradistinction a tax upon all transmissions within the Province owing to the death of a person domiciled therein of moveable property locally situate outside the Province at the time of such death is direct taxation and is *intra vires*.[4]

In *R.* v. *Caledonian Collieries* [5] the Alberta Mine Owners' Tax Act, 1923, which purported to impose upon every mine owner as defined in the Act a percentage tax upon the gross revenue of his mine during each preceding month, was held invalid as a form of indirect taxation. Lord Warrington (at p. 361) after examining the *dicta* of Lord Hobhouse in *Bank of Toronto* v. *Lambe*, cited above, laid down the rule that the general tendency of the tax must be looked at, and if its general tendency is for it to be passed on to consumers it is an indirect tax and invalid. So for example where the British Columbia Forest Act, 1924, which imposed a tax upon all timber cut within the Province except that upon which a royalty was payable, but provided that in the case of timber used or manufactured in the Province there should be a rebate of nearly the whole tax and prohibited under penalty the export of any timber without a certificate that the tax due in respect of it had been paid, was held invalid since in effect it was an export tax and came within s. 122 of the British North America Act, 1867.[1]

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[1] [1902] A.C. 73.

[2] [1896] A.C. 342.

[3] *Cotton* v. *The King*, [1914] A.C. 176.

[4] *Burland* v. *The King*, [1922] A.C. 215.

[5] [1928] A.C. 358.

**Interpretation in Australia.**—Similar cases of a constitutional character have arisen out of the interpretation of " direct " and " indirect " taxation in Australia. The Commonwealth of Australia Act, 1900, set up a scheme of finance under which uniform duties of customs (s. 88) were to be imposed within two years after the establishment of the Commonwealth, and until then the Commonwealth paid over the customs revenue to each State and at the same time debited it with Commonwealth expenditure incurred on its behalf (s. 89). To prevent the Australian States from subsequently getting behind the provisions for uniform Customs duties, they were expressly forbidden to impose excise duties or grant bounties, with the exception of bounties on gold or silver or other metals. The Australia Act, 1900, provided, s. 92 : " On the imposition of uniform duties of customs, trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." This section has to be read with the negative provisions of s. 99 : " The Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof " ; and s. 109 : " When a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid."

If these three sections were strictly interpreted a State could make no law governing trade or commerce within its confines without offending s. 92, in so far as by its effects it might indirectly raise more revenue from trade with one State than another, and similarly every Commonwealth Act might be impeached on the ground that in its ultimate effects it imposed more restrictions upon the citizens of one State than another.

There are degrees in all things : one person may be said to be bald and another not bald, but it is unnecessary to decide whether possession of the ten thousandth or ten thousand and first hair divides the two classes. So it is hard to distinguish in their entirety between valid and offending Acts. Each one must be looked at separately and its general character as a direct or indirect tax considered. Thus in *Fox* v. *Robbins*,[2] the State of Western Australia had passed in 1880 a Wine, Beer and Spirit Sale Act, under which any person selling wine was required to have a licence for which he had to pay a fee which was only £2 if he sold nothing but wine made from West Australian grapes, and £50 for a general licence to sell wine manufactured from grapes grown in other parts of Australia. The Act was in itself within the State powers,[1] but its intention was to give an indirect preference to the sale of West Australian wine and it was held *ultra vires* under s. 92. Likewise in *Cameron* v. *Deputy Federal Commissioner of Tasmania*,[2] Commonwealth Income-tax Regulations which made a tax-payer take into account increase in the number of cattle, sheep and stock at rates which varied in the different States—*e.g.* for sheep in New South Wales, 10*s.*; Victoria, 12*s.* 6*d.*; Queensland, 9*s.*; South Australia, 10*s.*; Tasmania, 10*s.*; Northern Territory, 12*s.* 6*d.*—was held to be a discrimination between the States and invalid under s. 99.

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[1] *A.-G. British Columbia* v. *McDonald Murphy Lumber Co.*, [1930] A.C. 357. See also *A.-G. for Canada* v. *A.-G. British Columbia* (the Salmon Canning case), [1930] A.C. 111.

[2] (1909) 8 C.L.R.

On the other hand, in *Roughley* v. *State of New South Wales*[3] the State of New South Wales had passed the Farm Produce Agents Act, No. 7 of 1926, and under regulations made under the Act no one was allowed to sell farm produce grown in other States without a licence for which £100 was payable. The appellant was threatened with prosecution and sought to have the Act declared invalid. It was held not obnoxious to s. 92 as it imposed a tax on produce agents in New South Wales as defined in the Act, but without making any discrimination against the States from which the produce came. So also in *Ex parte Nelson*[4] the New South Wales Stock Act (s. 143) which was intended to prevent the importation of cattle, sheep, goats, swine, dogs, etc., suffering from contagious diseases and enabled the Governor by proclamation in the Gazette to prohibit absolutely the importation or introduction of any stock for any specified time was held *intra vires*. In a unanimous judgment of Knox C.J., Gavan Duffy and Starke J.J. it was said:

> The establishment of freedom of trade between the States is perhaps the most notable achievement of the constitution. Yet it would be strange if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases. In a measure it must be conceded that the Stock Act of New South Wales does regulate the free flow of interstate trade and commerce in stock. If there is reason to believe that any infectious or contagious disease in stock exists, the stock may be stopped at the borders of New South Wales and if it enters may in some cases be destroyed. The seeming conflict may be resolved in our opinion by considering the true nature in the particular instance under discussion. The grounds and design of the legislation and the primary matter dealt with, the object and scope must always be determined in order to ascertain the class of subject to which it really belongs and any incidental effect it may have over other matters does not alter the character of the law. The Stock Act of New South Wales is not in itself a regulation of interstate commerce, though it controls in some degree the conduct and liability of those engaged in the commerce.

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[1] *Peterswald* v. *Bartley*, (1904) 1 C.L.R. 497.

[2] (1923) 32 C.L.R. 69.

[3] (1928) 42 C.L.R. 174.

[4] (1928) 42 C.L.R. 209.

Similarly various Acts of the Commonwealth Parliament passed during the War entitling the Commonwealth to requisition supplies in any part of Australia for the use of the Imperial Government were held to be valid, although in effect they might discriminate in favour of one State because most of the produce requisitioned might be grown there.[1]

**Taxation in South Africa.**—The Constitution of South Africa under the South Africa Act, 1909, is in no sense federal. The field of legislation left open to the Provincial legislatures amounts to little more than "gas and water government." But among the powers delegated to the Provincial Councils under s. 85 is "direct taxation within the Province in order to raise a revenue for Provincial purposes." There are not many instances where a Provincial Ordinance has been purposely framed to usurp powers not given it by the Act of 1909, because in such an event the Ordinance would be disallowed by the Governor of South Africa. But there have been several cases of pure misinterpretation. It is recognized that any taxation law imposed by a Provincial Council must contain sanction for its enforcement, and such a law will not be invalid because it encroaches upon the subjects allocated to the Union Parliament such as civil rights, and procedure, civil or criminal, or enacts penalties for its non-observance. In *R.* v. *Williams*[2] power of regulation of horse-racing and betting was conferred by Act of the Union Parliament on the Provincial Councils. In 1913 the Cape of Good Hope, partly to combat the evils of street betting and partly to raise revenue, by Ordinance No. 1910 of that year provided that betting otherwise than through the State-managed totalizator was a criminal offence, and the business of a bookmaker was made a criminal offence (whereas the totalizator had hitherto been illegal and bookmaking not illegal). The Ordinance was held invalid as it did not regulate horse-racing and betting, but prohibited betting in certain forms and legalized a special form of betting. Nevertheless it was held that a Provincial Council might pass an Ordinance against keeping a betting house as such would be "regulation of betting," and a person who offered prizes on what was substantially a lottery, *i.e.* guessing at which second in 86,400 seconds a clock would stop after being wound up to go for ten days, was properly convicted.[3] When once it is clear that the legislative provisions which are challenged fall under powers conferred upon the Provincial Councils the court cannot interfere with a tax on the ground that it is impolitic or unreasonable.[4] For example, in *McLoughlin* (*N.O.*) v. *Turner*,[5] a Transvaal Ordinance, No. 11 of 1919, made it unlawful for any person to carry on business *inter alia* as an advocate without a licence obtainable by paying an annual licence fee of £5. The Ordinance was impeached on the ground that it was more than a tax. It was alleged to be a prohibition of legal practice and repugnant to Proclamation No. 4 of 1902, which authorized the Supreme Court to admit persons possessing certain specified qualifications. The Supreme Court held the Ordinance valid. In *Beloomai* v. *Receiver of Revenue*[1] licences for general dealers were also held valid as a legitimate form of direct taxation.

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[1] *Vide Duncan* v. *State of Queensland*, (1916) 22 C.L.R. 556.

[2] (1914) A.D. 460.

[3] *R.* v. *Jones*, (1925) A.D. 117.

[4] *Middelburg Municipality* v. *Gertzen*, (1914) A.D. 540. See also *Consolidated Investment Co.* v. *Marshalls Township Syndicate*, (1917) A.D. 662.

[5] (1921) A.D. 537.

In considering the classification of a tax as direct or indirect the South Africa Supreme Court has adopted the same principles as were laid down in the earlier Canadian decisions. Not only has the manner of assessment to be considered but the ultimate effects of the tax. Thus in *De Waal* v. *North Bay Canning Co.*[2] the Cape Province by Ordinance No. 18 of 1920 had placed on companies carrying on in the Province the business of canning crayfish a 3 per cent. tax on the gross amount received by the company from the sale of tinned or canned crayfish during the twelve months preceding July 1 in any one year subject to a deduction of 20 per cent. to cover freight, insurance, exchange, brokers' commission and minor sundry charges. The North Bay Canning Co. was a corporation doing almost exclusively an export business, and it in fact passed the tax on to the consumer by charging a higher price for its products. The tax was held to be an indirect tax and *ultra vires.*

Conversely in *Clarke* v. *De Waal*[3] a licence duty charged by Cape Ordinance No. 16 of 1920 calculated upon the " turnover of the business during a period of twelve months ending June 30 in the calendar year preceding payment, the rate of duty being £1 on every £1,000 of turnover exceeding £1,000 to £5,000 and £2 on every £1,000 of turnover exceeding £5,000 with maximum £300," was held to be *intra vires* and within s. 85 (i). Innes C.J. (at p. 570) applied John Stuart Mill's definition of a direct tax adopted by the Privy Council in *Bank of Toronto* v. *Lambe,*[4] and held the tax was *intra vires* ; for although the intention of the Ordinance was not to tax the dealer personally, it was intended to tax him in proportion to his business and was none the less a direct tax notwithstanding the unusual mode of assessment.

Similarly, whereas a tax levied on petrol is held to be an excise duty,[5] a tax on motor cars varying with the horse-power is a direct tax and *intra vires* the Provincial Councils under s. 85 (i).[6]

It is hard to distinguish *Clarke* v. *De Waal* in legal principle from *Ingle* v. *Transvaal Provincial Administration.*[7] There the Transvaal Provincial Ordinances 17 of 1917 and 10 of 1918 had imposed a tax upon bookmakers " payable on the gross amount of money security or valuable thing paid or given or liable to be paid or given by any such bookmaker in fulfilment of any bet made by him with any person." Morris K.C. (Attorney-General) cited the now very familiar passage in John Stuart Mill's *Political Economy*[1] and put the case shortly for the Province: "The loss falls on the punter in just the same way as the companies tax in *Johannesburg Consolidated Investment Co.* v. *Transvaal Provincial Administration.*"[2] Innes C.J. took the view that the test was not the real ascertained incidence of the tax, but the intention, whether realized or not, of the legislature:

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[1] (1927) A.D. 401.
[2] (1921) A.D. 521.
[3] (1922) A.D. 264.
[4] 12 A.C. 575 (*cit.*, p. 204).
[5] *Commonwealth of Australia* v. *State of South Australia,* (1926) 38 C.L.R. 408.
[6] Naylor (*N.O.*) v. *Administrator Natal,* (1922) A.D. 512.
[7] (1926) A.D. 365.

> Whether a tax is direct or indirect depends upon the intention, expressed or implied, of the legislature. If it is intended that the person from whom it is demanded shall be the person to bear it, then it is direct; but if it is expected or intended that the tax-payer from whom it is demanded shall indemnify himself at the expense of another, then it is indirect. Now the intention of the law-giver must be gathered from the language used—bearing in mind the important qualification that he will be held to have expected the consequence of his enactment—so that if in the natural order of things and in the ordinary course of business the man from whom the tax is demanded can indemnify himself by recovering the tax from someone else, then it may be inferred that it was intended that he should do so.

He referred to *Cotton* v. *Rex*[3] and held that as the bookmaker deducted the tax from what he paid over, the tax was indirect and *ultra vires*.

For the reason that a Provincial tax if repugnant to any Union Act is invalid the doctrine of instrumentalities has never taken root in the Union of South Africa. The nearest to a conflict of instrumentalities occurred in *New Modderfontein Gold Mining Co.* v. *Transvaal Administration*,[4] where the Transvaal Provincial Council put a tax upon mining profits notwithstanding that by s. 123 of the South Africa Act, 1909, all rights in mines and minerals are vested in the Governor-General in Council. The tax was held valid, and as a consequence of this decision the Union Parliament passed a special Act, No. 5 of 1921, making it illegal for a Provincial Council to impose direct taxation on the product of, or income, or profits of mines or minerals. The Transvaal Provincial Council walked round this enactment by Ordinance No. 8 of 1922 which imposed a tax of £1 in respect of every employee in excess of eight persons employed by any person. As this tax was paid by the gold-mining companies and other large employers of labour without regard to minerals or profits, it was held not repugnant to the Union Act and valid (*Commissioners of Inland Revenue* v. *Crown Mines*).[5] By Act 5 of 1922, s. 9, a new enactment was passed by the Union Parliament prohibiting the "direct taxation of persons lands habitations and incomes of natives."

The general effect of these decisions is therefore that the courts have come to regard the distinction between direct and indirect as purely a question of interpretation. The courts look at the wording of the Act and the apparent intention of the legislature as ascertained from the Act.

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[1] People's Edition, chap. 2, p. 483.

[2] (1925) A.D. 487.

[3] [1914] A.C. 176.

[4] (1919) A.D. 367.

[5] (1923) A.D. 121.

# THE REVOLT AGAINST THE CAPITULATORY SYSTEM.

[*Contributed by the late* Sir Alexander Wood Renton, G.C.M.G., K.C.]

> " J'ai vecu sous tous les régimes."
> Balzac, *La Peau de Chagrin.*

The term " capitulatory system " is in international law applied strictly to the long series of treaties by which the Sultans of Turkey granted special privileges and exemptions to the nationals of various non-Moslem countries, residing and carrying on business within their dominions. For the purposes of this article, it is used in the wider sense connoted by the familiar expression " exterritorial jurisdiction." The object of the writer is first to describe briefly the origin and spread of the system of consular jurisdiction, particularly in the Near and Far East, and then to indicate the progress and present position of the gradual revolt against it among the countries subject to its sway.

The story commences with the " Capitulations " of the Ottoman Empire. The foundations of the system were laid in the Byzantine period.[1] In November 641, after the expeditions of Omar to Syria, Persia and Egypt, Byzantium concluded a treaty with the Arabs, by which the latter undertook, after the withdrawal of the imperial armies from Egypt, not to destroy Christian Churches or interfere with the affairs of Christians residing in that country, provided that the taxes imposed upon them were duly paid. This was probably the earliest treaty containing the principle of the exemption of Christians in religious matters from local jurisdiction in a Muhammadan country.[2] The Byzantines did not hesitate to make similar arrangements in treaties even with Christian Powers. In 944, in a treaty with Prince Igor, it was stipulated that the delicts of Greeks committed in Russia should be reserved for judgment by the Byzantine authorities.

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[1] A few other illustrations may be noted. King Amasis (579–526 B.C.) according to Herodotus (Bk. II, ss. 178–9), allowed Greek merchants to establish themselves at Naucratis, and permitted them to be judged by their own magistrates according to their own laws and customs. Similar immunities were granted by the Athenians (Miltitz, *Manuel des Consuls*, 1837–9, I, p. 11), the Romans (*ibid.* pp. 14, 15) and the Visigoths under Theodoric (*ibid.* p. 161). Justinian allowed Armenians in Constantinople to settle questions of marriage, inheritance, etc., according to their own laws (Pears, *Fall of Constantinople*, p. 144) and the Caliph Omar granted to the Greek monks in Palestine, about A.D. 636, special exemption from local jurisdiction (Pélissié du Rausas, *Le Régime des Capitulations dans l'Empire Ottomane*, vol. i, p. 9). Arabs at Canton were allowed to be judged and ruled by their own Cadis in the ninth century. (Heyd, *Hist. de Commerce de l'Orient*, vol. ii, p. 296).

[2] De Taube, *Europe Orientale et Droit International.* Recueil des Cours, vol. ii, p. 361.

Various treaties, which, in a wide sense of the term, may be described as "Capitulations," were made from the twelfth century onwards between Moslem Potentates and cities, such as Pisa, which had espoused the cause of the Crusaders, or which had important commercial advantages to offer. The Pisans obtained one such treaty from Saladin in 1173. Others were granted to Genoa and Venice in 1453 and 1455, to Florence in 1488 by Kait Bey, Sultan of Egypt, and in the sixteenth century to Marseilles and Montpellier, as well as to the Catalans.[1]

The Sultans of Turkey inherited the Byzantine tradition and extended it, Muhammadan law accorded no rights to the infidel. It was necessary to deprive him of its benefits by exempting him expressly from its operation. But the stranger could not for ever be regarded as an enemy. He was capable of playing an important part in the commercial development of the Ottoman dominions. "Le commerce est toujours exercé par la partie hétérodoxe d'un pays." And so the policy of granting special privileges to non-Moslem communities was expanded and crystallized into a definite system, to which was assigned the name of "Capitulations," a term derived from the Low Latin *capitula*—the chapters into which the treaty of exterritoriality was divided.[2]

France secured the first of these Capitulations in 1535. It was confirmed in 1740. Capitulations were subsequently concluded with Austria (1615), England (1583; 1675, confirmed in 1809); Holland (1680); Sweden (1737); Denmark (1746); Prussia (1761); Spain (1782); Russia (1783); the United States (1830); Belgium (1838); Portugal (1843); Greece (1855) and Brazil (1858).[3] The exterritorial privileges secured by the Capitulations may be thus roughly and compendiously described.

The foreigner was, in principle, amenable only to the control of his own consul. He was, within certain limits, free from local taxation, unless his own Government had assented to its imposition. The Turkish authorities had no right to enter his domicil save with his consul's authority. He was exempt from local jurisdiction in civil disputes with his co-nationals or with other foreigners. Civil suits with Ottomans were justiciable by the local tribunals, but the foreigner was entitled to the assistance of a representative of his own consular authority in the proceedings. It was only in litigations in which real property was involved that the *lex loci rei sitæ* was applied.

The Ottoman Capitulations were applicable to Egypt, which had become a Turkish Pashalik in 1517, in view of its incorporation into the Turkish Empire, but they were not, in fact, applied in Egypt in the form that they assumed in Turkey itself. The desire of successive Khedives to conciliate the foreign communities permitted the grafting on the text of the Capitulations of a customary law that made them more burdensome still. In Turkey, for example, the rule *actor sequitor forum rei* had, according to a decision of the Court of Appeals of the Mixed Courts in 1890,[1]

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[1] Heyligers, *L'Organisation des Tribunaux Mixtes d'Egypte.* Rec. des Cours, vol. xvii, p. 8).

[2] Heyking, *L'Exterritorialité et ses applications en Extrême-Orient.* Rec. des Cours, vol. 7, pp. 241 *et seq.*

[3] Heyking, p. 307.

> no application in the sense that Ottoman subjects must sue foreigners before their several consulates. On the contrary, in their litigation with Ottomans, foreign subjects, whether plaintiffs or defendants, fall within the jurisdiction of the Courts of the Empire, with the single guarantee of the presence of the dragoman of their Consulate.

In Egypt, on the other hand, the maxim *actor sequitur forum rei* was, by long usage, of universal application. The primary result of the customary law now under consideration was that Egypt found herself endowed with some seventeen consular tribunals, each administering justice according to its own law to its own nationals, in civil, commercial and criminal cases. The judgments of these tribunals were subject to appeal to courts sitting in many instances abroad, *e.g.* at Aix or Athens. Moreover, in so far as their civil and commercial jurisdiction was concerned, the rule that the defendant must be sued in the *forum* of his own Consulate was productive of somewhat startling consequences. When parties entered into a contract, they could not tell before what "deputies" they would be "impleaded," or by what law they would be judged, if any question arose as to the interpretation, or an alleged breach, of its terms. The moment that the apparition of probable litigation declared itself, there was a scramble among all the parties to secure, wherever that was possible, the *res litigiosa* and thus acquire the beatitude of the *possidentes*. If persons of different nationalities were being sued, the plaintiff had to institute as many actions as there were different defendants. Each had to be brought before his own consular tribunal and there was every risk of contradictory judgments being given. Nor was this all. Dexterous use was made of the guarantee furnished to the foreigner, under both Turkish and Egyptian law, by the presence of the dragoman, to extend the jurisdiction of the consular courts to Egyptian plaintiffs in suits against foreigners. The local court could not give judgment against a foreign defendant save in the presence of his dragoman. The fraudulent defendant refused or failed to produce the dragoman. The baffled plaintiff thereupon applied to the consular court to supply the omission and the consular court dealt with the case on the merits, pronounced judgment in the plaintiff's favour and compelled his dishonest adversary to pay. Exceptional interferences of this character soon became precedents, and Egyptian suitors found themselves swept triumphantly into the net of consular jurisdiction in cases in which they had neither the need of, nor the desire for, its assistance.

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[1] Brinton, *Mixed Courts of Egypt*, p. 9.

The customary law in Egypt created still further confusion by recognizing a jurisdiction in the consular, concurrent with that of the Egyptian, courts over immoveable property. Finally has to be noted the system of *protégés*, by which certain classes of Ottoman or Egyptian subjects were placed under the protection of Capitulatory Powers. Designed originally to enable native subjects to be nominated as dragomans, this system gave rise in Egypt, as indeed in the Turkish Empire generally, to the gravest abuse. It received in the hands of the Powers and their representatives and agents an extension, the practical effect of which was to withdraw thousands of Turkish and Egyptian subjects from their proper national law and jurisdiction and to confer upon them immunities that they were not entitled, and were entirely unfit, to enjoy.

The following extract from a letter of Nubar Pasha gives a humorous picture of consular jurisdiction in Egypt at that period: [1]

> Voulez-vous connaître mon opinion sur la justice consulaire en Egypte. Elle est aussi juste et aussi équitable que la justice du Ciel. Le Consulat de Grèce répresente en Egypte la Cour de L'Archange Gabriel, L'Archange Michel est répresenté par le Tribunal d'Italie. Saint Paul, en personne, est descendu au Consulat d'Angleterre, et Saint Pierre, ses clefs à la main, tient un lit de justice au Consulat de France. . . . Mais il y a un *drawback* à tout cela : c'est que chacun de ces archanges et de ces saintes a sa loi, sa manière à procéder. Or, comme un pauvre diable qui entreprend une affaire ne connaît pas qui le jugera, il ne peut jamais se mettre en règle : il est appelé devant Saint Pierre lorsqu'il croyait avoir affaire à Saint Paul ; il est troublé, confondu : il a raison, et, malgré cela, il est envoyé saintement à tous les diables.

After various tentative measures had been tried as a relief to the situation, the stage was set for a more ambitious drama, and the appearance of an actor whose work was to endure.

In 1867, Nubar Pasha, the Armenian Foreign Minister of Ismail Pasha, presented to the Khedive a report in which, after insisting that in Egypt the Capitulations existed only in name, and that the customary law grafted upon them was fatal to the development and prosperity of the country, he boldly launched his proposals for the establishment of the mixed courts. In its inception, Nubar Pasha's scheme contemplated the practical transfer of the jurisdiction of the consular courts to tribunals in which the foreign element should be predominant but which, for all that, should be national and not international in character and should sit to administer not foreign but national law. In order to secure this unification of jurisdiction, Nubar Pasha was willing to offer to the Capitulatory Powers "même des garanties superflues."

It is impossible here to trace in detail the course of the long diplomatic battle that followed. Its concluding stages were the completion, in the beginning of 1873, by a Conference at Constantinople, of the *Règlement d'Organisation Judiciaire*—the Charter of the Mixed Tribunals—and of the Codes which they were to administer, the submission of these documents to the Capitulatory Powers, and the formal inauguration of the new courts by the Khedive on June 28, 1875. The consular courts still retained, at the last, their jurisdiction over all civil litigation between foreigners of the same nationality. Nubar Pasha's proposal to invest the Mixed tribunals with jurisdiction over all crimes, whether committed by Egyptians or by foreigners, was not accomplished. The criminal jurisdiction in fact conferred on the Mixed Courts is confined to (*a*) police offences; (*b*) offences directly connected with the administration of justice before these tribunals themselves; (*c*) offences against the bankruptcy laws (*banqueroute simple* or *frauduleuse*). The consular courts still deal with the prosecution of crimes committed by foreign subjects other than those to which the competence of the Mixed Courts extends, as well as with questions of the personal status of their nationals.

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[1] Heyligers, *Tribunaux Mixtes d'Egypte*. Rec. des Cours, vol. xvii, p. 19.

For the rest, Nubar Pasha's vision has in large measure attained fulfilment. The Mixed Courts, in spite of the fact that they contain a majority of foreign judges, are not "international" in the sense in which that term is applied to the Mixed Courts at Shanghai and Tangier. They are, strictly speaking, national tribunals, and the Codes that they administer, although prepared internationally and founded on foreign jurisprudence, have been made, by adoption, Egyptian law. Moreover, the Mixed Courts have effectually wrested from the consular tribunals the indirect jurisdiction over Egyptian subjects conferred upon the latter by the local customary law. Nor is this all. They have successfully asserted jurisdiction wherever, in a litigation, a "mixed interest" is discoverable, even although both the actual parties to it may be natives.

A word should be added here as to the legislative powers of the Mixed tribunals, which play a not unimportant part in the recent treaty negotiations. The Charter contained no provision for the amendment of the law that these had to administer. Art. 12 of the Mixed Civil Code provided that necessary additions and modifications might be decreed by Government, with the approval of the *Corps de la Magistrature*. This power was never exercised. In 1889, a Khedival decree was issued, with the consent of the Powers, which delegated to a General Assembly of the Court of Appeals authority to sanction new police regulations. In 1911, the Court of Appeals of the Mixed Courts, with additions to its membership, was itself constituted (Law of November 11, 1911) a Legislative Assembly, with authority to approve, on behalf of the Powers, of all amendments to the *législation mixte*. This enactment does not enable the Assembly to amend the Charter, or to approve of fresh taxation interfering with capitulatory privileges.

The law administered by the Mixed Courts consists of a Civil Code, a Code of Commerce, a Penal Code, a Maritime Code, and Codes of Civil and Commercial and of Criminal Procedures, all based on foreign models. These codes were brought into operation by Khedival decree of September 16, 1875, as from October 18 in the same year. The foreign judges are drawn from the following different nationalities—Great Britain, France, Belgium, Denmark, Spain, Italy, Holland, Portugal, Greece, Sweden, Norway and the United States. Germany and Austria lost their capitulatory rights in Egypt at the close of the Great War, but have since then practically regained them by special treaties in 1925 and 1929 respectively.

The machinery provided by the Capitulatory Powers for the exercise of consular jurisdiction has varied with the importance and numerical strength of the communities which they severally represent. Great Britain, as the paramount Power, has set up an elaborate system of local and provincial courts with an appeal first to a Supreme Court sitting at Alexandria and presided over by a professional lawyer—"His Britannic Majesty's Supreme Court for Egypt"—and ultimately, in certain cases, to the Judicial Committee of the Privy Council. The law applied by these tribunals is that of England, "in so far as circumstances admit." France and Greece also have professional judges in their consular tribunals; they have no intermediate appellate tribunals: appeals lie directly to national courts, sitting respectively at Aix and Athens. The United States' jurisdiction is exercised by the Consul, with an appeal to the United States Minister whose decision is final.[1]

In Egypt,[2] the rights conferred on foreigners by the Capitulations, apart from certain commercial concessions, included: immunity from personal taxation without the assent of their Governments, inviolability of domicil, protection from arbitrary arrest and exemption from the jurisdiction of the local courts. Since the creation of the Mixed tribunals in 1875, the practical effects of the last-mentioned privilege have been that no legislation applicable to foreigners could be enforced without the consent of the Capitulatory Powers, and that civil jurisdiction in cases between Europeans and natives, or between Europeans of different nationality, is exercised by the Mixed tribunals, while criminal jurisdiction over Europeans and jurisdiction in civil cases between Europeans of the same nationality are exercised by the consular courts, applying the laws of their own countries.

The capitulatory system was extended to other non-Christian States on the Mediterranean littoral—Tripoli, Tunis, Algeria and, above all, Morocco. Of these, Morocco may be taken as an example. The establishment of exterritorial jurisdiction there commenced with the Franco-Moroccan treaty of September 17, 1631, supplemented by later agreements in 1867 and 1892, and was gradually extended to other States, America (1836), England (1856), Spain (1861), Belgium (1862), Austria (March 19, 1880).

Under these agreements, foreigners were subject in civil, commercial and penal matters to the exclusive jurisdiction of their own consuls. In disputes between foreigners or natives, the rule *actor sequitur forum rei* was rigorously applied. Controversies between foreigners of different nationality were dealt with by an International Tribunal composed of the consuls of the different States, represented at Tangier. The sole exception from this wide radius of exterritorial jurisdiction was that in actions relating to immoveable property, situate in Moroccan territory, the *lex rei sitæ* was followed and the issues were submitted to the appropriate native tribunal.

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[1] Brinton, *ubi sup.*, p. 291.

[2] See *Report of Milner Commission* (Egypt, No. 1, 1921, Cd. 1131), p. 19 fn.

In Morocco, as in Egypt, the system of "protection," by which the benefit of some of the privileges of the Capitulations was extended to large numbers of natives, acquired alarming proportions. In its origin, it was intended merely to secure the immunities granted to the consuls and foreigners generally, by preventing their servants and agents from being arbitrarily interfered with by Moroccan functionaries. An early illustration of its *raison d'être* is to be found in a treaty of May 28, 1767, concluded between Louis XV and the Sultan Si Mohammed Abd Allah. Art. 11 of this instrument is thus expressed:

> L'Empereur de France peut établir dans l'Empire du Maroc, la quantité de Consuls qu'il voudra. . . . Ceux qui seront au service des Consuls—secrétaire, interprète, courriers ou autres, tant au service des Consuls que de marchands, *ne seront empêchés dans leurs fonctions*, et ceux du pays seront libres de toute imposition et charge personelle.

The limited immunities conferred on Moroccan *protégés* by treaties of this character were, however, gradually enlarged. The *protégé* practically lost his nationality and was withdrawn, alike from the administrative and judicial control of his national government, and the consulates became agencies for a regular traffic in the issue of certificates of protection.

With the exterritorial history of Morocco is inextricably interwoven that of the City of Tangier.

After a succession of wars, in which Romans, Carthaginians, Vandals, Byzantines and Arabs play leading parts,[1] Tangier was occupied by the Portuguese in 1471. It passed to Philip II, King of Spain and Portugal, in 1578, but after the separation of the two Kingdoms in 1640 it came again under the sovereignty of the House of Braganza. In September 1657, in a curious letter recorded in Thurloe's *State Papers*,[2] Monk endeavoured to interest Oliver Cromwell in its potentialities.

> I understand the Portuguese Ambassador is come to London: and I make no question but he will be desiring some favour from my Lord Protector. There is a castle in the Streight's Mouth, which the Portugals have called Tangar on the Barbary side, and which, if they would part with it withal, it would be very useful to us: and they make very little use of it except for the getting of Blackamoors, for which His Highness may give him leave to trade.
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> An hundred men will keep the castle, and half a dozen frigates there would stop the whole trade in the Streights to such as be enemies to us.

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[1] For details, see *Tangeri*, by Livio. 1927.

[2] Vol. 6, p. 505.

In 1662, Charles II acquired Tangier as part of the dowry of Catherine of Braganza. In 1684, England abandoned it to the Moors.

The story of consular jurisdiction proceeded for some time in Tangier on lines parallel to those of its general development in Morocco. But, early in the eighteenth century, Tangier began to acquire the special international character which it has since retained—a character derived from the creation within its limits by successive treaties of a municipal administration which, under the nominal sovereignty of the Sultan, was the real governing power in the country.

Meanwhile, the absence of order and of similarity in education and outlook, the religious differences and the desire for commercial expansion, which had formed the *raison d'être* of the Ottoman Capitulations, had carried the capitulatory system, in the wider sense, far beyond the dominions of the Sultans of Turkey. Eastward, and still farther eastward, the course of exterritorial jurisdiction took its way. England played a leading part in the movement. Nor was this unnatural. The charters constituting the Merchant Adventurers Company, the Russia or Muscovy Company and the Levant or Turkey Company had established in different countries, and had familiarized the English people and their sovereigns with the existence of, organized groups of traders who were subject to governing bodies of their own election. The charter of the Levant Company expressly authorized its General Court to choose consuls and vice-consuls in all places in the Levant Sea.

In time, doubts came to be entertained as to the legality of the jurisdiction which was supposed to be vested in consuls in the Ottoman Empire. Recourse was had to legislation. The Foreign Jurisdiction Acts set forth that "whereas, by treaty, capitulation, grant, usage, sufferance and other lawful means," the Sovereign "has jurisdiction within divers foreign countries," such jurisdiction might be exercised in the same manner as if it had been acquired "by the conquest or cession of territory." Armed with this weapon, England carried her exterritorial jurisdiction into all parts of Asia and Africa in which the influence of her Empire had established itself. Nor were other Powers backward in anticipating or emulating her example.

The introduction of exterritoriality into Persia[1] commenced with the peaceful penetration effected by the Muscovy Company, the Russian Company and similar corporations, in the sixteenth century. In 1598 Shah Abbas granted to Sir Anthony Sherley, as the representative of Queen Elizabeth, a patent conceding to all Christian merchants freedom to reside, travel and trade in all parts of his empire. This patent, which was confirmed in 1632 and renewed in 1736, declared itself to be irrevocable and contained besides one clause of a distinctively capitulatory character :

> Aucun de nos juges n'aura le pouvoir sur la personne (*des marchands chrétiens*) et leur bien, pour n'importe quelle cause ou n'importe quel acte.

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[1] See *La Suppression des Capitulations en Perse*, by Matine-Daftary, p. 51.

The Capitulatory régime was, however, definitely established in Persia, as regards Russia, by the Treaty of Turkmenchay in 1828, and was subsequently extended to other Powers either, as in the case of Germany, by express convention, or, as in that of the Anglo-Persian Treaty of March 4, 1857, by the concession of a " most favoured nation " clause.

Current events render necessary a special reference to China and the International Settlement in Shanghai. In China, Russia was first in the field. In 1689, she made a convention with the Chinese Government that if, thereafter, any of the subjects of either Government, having passed the frontier for private and legitimate business, should, while in the foreign territory, commit crimes of violence to property and life, they should at once be arrested, sent to their own country and handed over to the local authority for punishment. A similar stipulation appears in subsequent Russo-Chinese treaties down to that of October 17, 1768, in which it was provided that Chinese subjects, guilty of brigandage in Russian territory, should be brought before the Chinese authorities, and Russian subjects, guilty of similar offences in China, before the Russian Senate. The first explicit modern grants of exterritoriality by China are made in treaties with England in 1842, and the United States in 1844. Similar concessions were made later on to eighteen other States, and this policy was continued down to the outbreak of the Great War in 1914.

Shanghai, which is the pivot of the exterritorial question in China, as Tangier has been in the case of Morocco, was one of the five Chinese ports opened to foreign trade and residence by the Treaty of Nanking, between Great Britain and China, concluded on August 29, 1843. Here, as elsewhere in the case of grants of exterritorial privileges, the primary provision was a stipulation for the setting apart by the local authorities, in communication with the consul, of a strip of territory as the site of the foreign settlement. A similar concession was granted to France by the Treaty of Whampoa, and to America by the Treaty of Wanghea in 1844. The period between that date and the establishment of the Mixed Court in 1864 comprised a number of not unimportant episodes, which it must suffice to enumerate—the controversy between Great Britain, on the one hand, and France and the United States, on the other, as to whether or not the original concession under the Treaty of Nanking was exclusively British, the adoption in 1854 of the plan of an " International Settlement," with municipal administration, the location of the French Settlement in 1854 and the American in 1863, the latter of which was, shortly afterwards, practically united with the British in respect of all municipal arrangements, and the influx into the territory of an annually increasing number of Chinese, fleeing from the disorders outside for the greater security which its shelter afforded.

This Chinese population was liable to pay its share of local taxation but had no voice in the administration. The neglect of the Chinese officials to discharge their treaty obligations in regard to the protection of foreigners forced the municipal authorities to assume responsibilities neither contemplated nor desired at the date of the treaties. The savage attacks on foreigners by imperialist troops in 1853 led to the formation in the settlement of an international volunteer corps and the subsequent organization of an efficient police force. Moreover, such was the chronic indifference of the Chinese Government to the position of its own subjects in Shanghai that for many years the British and American consuls assumed jurisdiction in respect of offences committed by Chinese in the settlement, and a rule was laid down which, while paying lip-service to the "indefeasible" right of jurisdiction of the Chinese authorities over Chinese residents in the settlement, stipulated that no Chinese warrant could be executed there, unless countersigned by the consul. With the constitution of the Mixed Court in 1864, the establishment of special international jurisdiction in Shanghai was, for the moment, completed.

This tribunal was presided over by a Chinese official, assisted by consular officers as assessors for the hearing of suits and criminal charges brought by foreigners against Chinese. It was further authorized to hear cases against Chinese in foreign employ, and, later on, to try any Chinese for the commission of an offence within the foreign quarter; the rule as to the counter-signature of warrants was maintained "in order to prevent misunderstanding."

It should be added that, in 1869, the French established a Mixed Court of their own by direct arrangement with the Chinese authorities. It was presided over by a French consular officer, associated with a Chinese "magistrate."

Prior to 1855, trade between Siam and the subjects of the various Western Powers had been conducted on restricted and precarious lines; foreign merchants had been admitted into the country, but their operations had been hampered by difficulties and disabilities.[1] In 1855, Great Britain concluded a treaty with the Siamese King which ushered in a new régime. It opened the Siamese kingdom for the first time to the unrestricted influence of foreign commerce. In virtue of it, British nationals acquired the right to trade freely in all seaports, subject to clearly defined import and export duties; they further acquired the right to reside and to purchase land in the vicinity of the capital (journeys into the interior, however, were allowed only under Siamese passports): finally, the Siamese Government consented to the appointment of a British consul at Bangkok, and to the exercise by him of exterritorial jurisdiction over all British subjects in the country. France concluded a similar treaty with Siam in 1856, and most of the other civilized Powers followed suit—the United States in 1856, Denmark in 1858, Portugal in 1859, the Netherlands in 1862, Sweden and Norway, Belgium and Italy in 1868, Austria-Hungary in 1869, Spain in 1870, Japan in 1898 and Russia (by declaration) in 1899.

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[1] Heyking, *ubi sup.*, p. 298.

Consular jurisdiction was established also in Abyssinia,[1] Japan, Corea, Borneo, Brunei, Sarawak, Madagascar, Zanzibar and the Pacific Islands.

Exterritorial jurisdiction is a provisional system which should be abandoned as and when the conditions justifying its adoption and application have ceased to exist.

It disappeared in Madagascar on the French annexation in 1896,[2] in Cyprus, finally, on its direct incorporation into the British Empire in 1914, in Tunisia, Algeria and Tripolitana, when the first and second passed under French, and the third under Italian, control.[3] On similar grounds, it has been superseded in the French and Spanish zones of Morocco, in which, however, British and American subjects are still justiciable only by their own consular tribunals. The French and Spanish courts deal, in their respective spheres of influence, with cases by or against other classes of foreigners. To the same category belong the abolition of exterritorial jurisdiction in the Anglo-Egyptian Sudan in 1899, and its disappearance in Corea on its annexation by Japan in 1910.

But, apart from almost automatic readjustments of this character, a persistent struggle against the capitulatory system has been going on for nearly a century. It vanished in Greece, and, notwithstanding a warning note in the Treaty of Berlin, 1878, against its suppression otherwise than with the consent of all the parties concerned, in Rumania and Serbia, when these countries secured their political independence.[4] In 1894, exterritorial jurisdiction in Japan was, at the instance of Great Britain, renounced by the European and American Powers as from 1899.

The Ottoman Government, admitted into the Concert of Europe by the Treaty of Paris in 1856, pressed its claims to an abrogation, by the interested Powers, of the Capitulatory régime with ardour and persistence, and reinforced its appeals by the periodic promulgation of new codes of law and by other evidences of a spirit of reform. These efforts proved unsuccessful,[1] and accordingly Turkey determined to take advantage of the outbreak of the Great War to solve the problem for herself. In September 1914, she purported to abolish the Capitulations by unilateral act. The Allied Powers protested, but, after an ineffectual attempt to re-establish the Capitulations under the Treaty of Sèvres, they were definitely abolished by Art. 28 of the Treaty of Lausanne (No. 16 of 1923). Under Chapter II of the Convention, "respecting conditions of Residence, Business and Jurisdiction," allied nationals are given free access to the Turkish courts, and may sue and be sued in the same way as Turkish nationals. The sole remaining vestige of the Capitulations in Turkey is to be found in a provision that questions of the personal status of non-Moslem nationals of the Allied Powers shall be reserved for their national courts, unless all parties consent in writing to the jurisdiction of the Turkish courts, in which case the national law of the parties is to be applied (Art. 16).

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[1] Where it still exists.

[2] Law of August 6, 1896.

[3] The French Protectorate in Tunisia, established by Treaty of May 12, 1881, confirmed by a Convention of June 8, 1883, was promptly acknowledged by Great Britain, in pursuance of Lord Salisbury's agreement, at the Conference of Berlin in 1878, to leave France a "free hand" in Tunis in return for her acquiescence in the British occupation of Cyprus. The British consular jurisdiction was abolished by Order in Council of December 1, 1888. Italy recognized the French Tunisian Protectorate in 1896, the right of Italian residents to retain their nationality being recognized. Tangier by its Statute of December 18, 1923, as amended by the Final Protocol of 1928 (Morocco, No. 1 of 1928, Cmd. 3165) is placed under a régime of permanent neutrality, with an international legislative assembly of its own and a Mixed Court replacing the Capitulations. Algeria is an integral part of France. Tripoli has been under Italian influence since November 1911, and foreigners there are subject to the jurisdiction of the Italian courts.

[4] The Capitulations seem not to have been in force in Montenegro. Austria abolished them in 1880, in Bosnia and Herzegovina, which, annexed to her in 1908, passed to the Serbs, Croats and Slovenes in 1919 (Wheaton, *Inter. Law*, 6th ed., vol. i, 267). Great Britain renounced her rights in Albania by Note of February 6, 1926.

The Great War, which provided Turkey with an opportunity for denouncing the Capitulations, brought Egypt definitely, for the time being, under British control. On August 6, 1914, the Egyptian Government by a decision of the Council of Ministers of that date called upon the Commander-in-Chief of the British troops in Egypt to undertake the defence of the country.[2] A Protectorate was declared on December 18, 1914.

In 1917, as the result of negotiations between the Powers principally interested in the matter,[3] the Egyptian Government appointed a mixed commission of foreigners and Egyptians to prepare the material for the reforms that would be necessary, if, as was anticipated, the Capitulations were abolished at the close of the War. This body was generally known as the Capitulations Commission. Under its auspices, considerable progress was made with the drafting of new codes of law and procedure, civil and criminal, and a scheme was prepared, for further discussion, for a reorganization of the courts, based on a unification of the existing jurisdictions of the Consular, Mixed and Native Courts. The publication of this scheme, of which the provisional nature was misunderstood, coupled with the circulation of rumours as to the supposed intention of its authors to abolish the use of French in the unified tribunals and to anglicize the Bar, gave the *coup de grâce* to the work of the Commission.

In 1920, a project was announced, of which the essential features were (i) the reorganization of the Mixed Courts, and their investiture with full criminal jurisdiction over foreigners, as well as jurisdiction in all civil cases involving foreigners of the same nationality, including questions of personal status; (ii) the surrender by the Powers of their exterritorial rights to Great Britain as trustee for foreign interests in Egypt. These proposals, however, proved abortive. One of the provisions of the contemplated judicial reorganization made the Privy Council the final Court of Appeal, and to this the Mixed Courts took exception. Moreover, there was some international hesitation as to the surrender of capitulatory rights.

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[1] Abelous, *L'Evolution de la Turquie*, pp. 97 *et seq.*

[2] See *Finck* v. *Minister of the Interior* (1924), *British Year Book of International Law*, 1925, p. 219.

[3] Hansard, vol. 113, col. 2392.

Meanwhile the march of events continued till, on February 28, 1922, the British Government made its famous unilateral declaration, abolishing the Protectorate, and recognizing Egypt as "an independent sovereign State," but reserving absolutely

> to the discretion of His Majesty's Government, until such time as it may be possible by free and friendly discussion and friendly accommodation, on both sides, to conclude agreements in regard thereto between (the two Governments),

the four questions of security of British communications in Egypt, the defence of Egypt against foreign aggression, the protection, in Egypt, of foreign interests and of minorities, and the Sudan.

The last points, deserving of notice, in the development of the politico-legal situation in Egypt are the proclamation of the new Egyptian Constitution on April 19, 1923, and the series of abortive draft treaties of 1927–8 with Sarwat Pasha (No. 1 of 1928: Cmd. 3050), of August 1929, with Mahmud Pasha (No. 1 of 1929: Cmd. 3376) and of May 1930, with Nahas Pasha (No. 1 of 1930: Cmd. 3575).

The new Egyptian Constitution dealt with the exterritorial situation only in a saving clause,[1] providing that the application of the Constitution

> shall not be allowed to impair the obligations which Egypt owes to foreign States, nor the rights which foreigners shall have acquired in Egypt by virtue of laws, treaties and accepted usages.

Each of the draft treaties, apparently at the moment of being brought safely to land, was shattered on the reefs of some political controversy or condition. On certain points, all three drafts agree. The Mixed Courts are to be utilized as the tribunals to which it is proposed that the jurisdiction of the consular courts should be transferred, and the British Government undertakes to use all its influence to secure the assent of the Capitulatory Powers to such a transfer. The possibility of objection being taken to the transfer of questions of personal status is envisaged by all three drafts. In all three, it is anticipated that an agreement can be reached for the exercise by the Mixed Courts of jurisdiction in such cases "where British subjects are concerned." Finally, all three drafts provide that, in future, any assent necessary before Egyptian legislation, including fiscal legislation, is applied to foreigners shall be given by the General Assembly of the Mixed tribunals, except in the case of legislation relating to the constitution or jurisdiction of these tribunals themselves, which shall not come into force until it has been approved by the Powers.

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[1] Art. 154.

The competence of the General Assembly is to consist, however, in satisfying itself that the legislation in question is not inconsistent with the principles generally adopted in modern legislation which is applicable to foreigners, and, with particular relation to legislation of a fiscal character, that it does not inequitably discriminate against foreigners, including foreign countries.

Most of the capitulatory immunities in Egypt, whatever may have been their original compass, have now assumed shrunken proportions. Foreigners acquiring immoveable property in Egypt have all along—at first by their own voluntary act, and later on as a statutory obligation—paid land-tax. They accepted liability for house-tax in 1889. They are charged with municipal assessments. They are, in fact, exempt only from personal taxes without the consent of their respective Governments. Those who engage in commerce or industry are subject to the same exactions as natives. So much for immunity from taxation.

Then, inviolability of domicil. Art. 21 of Title II of the *Règlement d'Organisation Judiciaire* provides that, except in cases of *flagrant délit* or of a cry for help from inside, no house shall be forcibly entered by the police during the night. But, save in such special circumstances, inviolability of domicil now ordinarily means only that a necessary preliminary to a search of a foreigner's house is a notice to his consul, who is thus put in a position to send a representative to watch the proceedings.

The Capitulatory system appears to have produced less friction in Persia than in the Ottoman Empire, at any rate till the establishment in the country of different zones of influence by the Anglo-Russian agreement of 1907. But that event and the repercussions from the unilateral denunciation of the Capitulations by Turkey in 1914 set the revolt in motion. The action of Turkey subjected Persian nationals resident in the Ottoman Dominions to the jurisdiction of the Turkish tribunals. Persia did not hesitate, accordingly, to abolish forthwith the exterritorial privileges enjoyed by Turkish subjects in Persia. But, save for an unsuccessful effort, in 1918, by the Cabinet of the day, to follow Turkey's example, Persia pursued a more cautious policy. The Soviet renunciation of capitulatory rights in the Treaty of Moscow, 1921, and the disappearance of Germany and Austria after the War from the ranks of the Capitulatory Powers simplified the problem. By a combination of different methods of attack—separate treaties, representations to the Peace Conference, notifications to Powers whose rights depended, exclusively or mainly, on the "most favoured nation" clause, of the abolition of exterritorial immunities granted by express treaty stipulation, the use, as in the negotiations with Great Britain, of the diplomatic weapon by which a desideratum of a Capitulatory Power was blocked while her own wishes were thwarted, and, above all, the preparation of codes of law and procedure with safeguards for foreign interests—Persia secured the abrogation of the Capitulations on May 10, 1928.

The movement in China for the abrogation of the Capitulatory system received a definite impetus from a series of treaties concluded in the early part of the present century, viz. between Great Britain and China, on September 5, 1902, China and the United States and Japan on October 8, 1903, and China and Sweden on July 2, 1908. In these treaties it is recited that, China having expressed a sincere desire to reform her judiciary system in harmony with that of Western nations, the Treaty Powers agreed to give her every assistance in that endeavour and will be disposed to abandon their exterritorial rights whenever they are satisfied that the character of the laws of China, the arrangements made for their administration and other considerations, justify such action. In pursuance of these engagements, a new judicial system based on that of Japan and Continental European countries was set up by legislation commencing in 1907.[1] Provision is made for a Supreme Court at Peking, a High Court in each Province, and a District Court in each District. The Penal Code was revised in 1910, and Codes of Civil and Criminal Procedure have been promulgated. Judgments have to be given in writing, setting out both the facts and the grounds for the decision. Parties may be represented by legal advisers and have ample opportunities for appeal in civil and criminal cases.

On December 10, 1921, at the Washington Conference on Limitation of Armaments, the Chinese delegation declared exterritorial jurisdiction to be suppressed. The parties to the Conference (England, the United States, Belgium, France, Italy, Japan, the Netherlands and Portugal) took cognizance of this declaration, and, in 1922, agreed to relinquish exterritorial rights as soon as the state of Chinese law warranted it, and resolved to appoint a Commission to inquire into the whole subject. The Commission was appointed on January 12, 1926, and presented its report on September 26 in the same year. The Commission was unable to recommend that exterritoriality should be immediately relinquished. It emphasized the need of entrusting the administration of justice to a judiciary, protected against any unwarranted interference by the executive Government or the Military, and laid down a programme, which the Chinese Government was advised to adopt, for the improvement of the existing legal, judicial and prison systems of China. When the principal items in this programme had been carried out, the Powers might consider the abolition of exterritoriality "according to such progressive scheme, whether geographical, partial or otherwise, as may be agreed upon." The Commission prefaced its recommendations with the following important proviso:

> It is understood that, upon the relinquishment of exterritoriality, the nationals of the Powers concerned will enjoy freedom of residence, and trade and civil rights in all parts of China.

More recently, Mr. Justice Feetham, of the Supreme Court of South

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[1] *Exterritoriality in China.* Turner, *British Year Book of International Law*, 1929, p. 62.

Africa, has been called upon to explore the situation in China. His masterly and impartial Report points to the conclusion that the condition, stated by the Exterritoriality Commission of 1930 to be a necessary preliminary to the abolition of consular jurisdiction in China—viz. the freedom of the judiciary from Executive, and particularly from military dictation—still remains unsatisfied.

From 1900 onwards, China had made no grant of exterritorial jurisdiction to any Western nation, with the exception of Switzerland, which obtained it by treaty of June 13, 1918.[1] Germany lost her exterritorial rights in China by the Treaty of Versailles, Austria-Hungary by the Treaty of Saint Germain, Soviet Russia by a declaration in 1921 and formal agreement in 1924. The new States, created after the Great War, could have no exterritorial rights in China unless such rights should be, as they have not been, conceded. Moreover, the Nationalist Government, after assuming control of the whole of China in 1927–8, entered on a vigorous campaign with a view to eliminating the exterritorial clauses in the original Capitulatory Treaties. The *modus operandi* was as follows: Each of the treaties attacked provided for the periodic revision of its "tariff and commercial articles," at the instance either, as in the case of the Belgian Treaty of 1865, of the party enjoying the exterritorial rights, or of either party. Under this provision, the Nationalist Government denounced the exterritorial jurisdiction which each of the treaties in question created or recognized. It was, of course, pointed out by the Governments concerned, viz. the Belgian, the Spanish, the Italian, the Portuguese, the Japanese, the French and the Danish, that the revision clauses had no application, direct or indirect, to exterritorial jurisdiction. The Belgian Minister, in particular, was in a position to argue that, even as regards "tariffs and commercial articles," the option of revision belonged to his Government alone. But ultimately, after a unilateral reference in the Belgian case to the Permanent Court of International Justice, the controversies ended in a series of new treaties.

All the Sino-Foreign Treaties of 1928 provide for tariff autonomy for China and mutual equality in tariff matters on a "most favoured nation" basis. The Sino-Belgian, Sino-Italian, Sino-Danish, Sino-Portuguese, and Sino-Spanish provide for the abolition of exterritorial jurisdiction, subject, however, in each case, to the condition that by the date fixed for such abolition (viz. January 1, 1930) the Chinese Government should have made detailed arrangements with the other contracting party for the assumption by China of jurisdiction over its nationals. In default of such arrangements, the abrogation of exterritorial privileges is to take effect when a majority of the Powers now possessing such privileges shall have agreed to relinquish them.

The history of the International Settlement at Shanghai from 1864 onwards is the record of a long diplomatic struggle, sometimes accentuated by riots, at other times interrupted by revolution, between the desire of the foreign communities to mould the administration of justice in conformity with Western standards and the aspirations of the new spirit of nationalism in China. In the Mixed Court, an "established practice," bearing a strong resemblance to the "customary law" in Egypt, grew up, under which the foreign assessor became once more a judge. Similarly, in the French Mixed Court, the Chinese "magistrate" was practically converted into an assessor. The Chinese officials, on their side, strove by the posting up of proclamations, and in other ways, to assert, over the Chinese residents, an authority which the municipal council contested as being incompatible with the administration of the area. A formidable riot broke out in 1905 and the Chinese Government intervened. An Imperial Edict of January 14, 1906, limited the powers of the Mixed Court. Then came the revolution of 1911, organized government broke down, and the consular body was obliged to take the administration of the Mixed Court into its own hands. This assumption of control was intended to be merely a temporary expedient. But the sequel illustrates the force of the maxim—*Ce n'est que les mesures provisoires qui sont permanentes*. It was not till January 1, 1927, after apparently interminable negotiations, retarded by the Civil War of 1924, that the rendition of the Mixed Court to the Chinese authorities was effected. The Mixed Court was replaced, under the terms of the rendition, by a Provisional Court, competent to try (1) all civil and criminal cases arising in the settlement, except those tried in consular courts; (2) mixed criminal cases, arising on foreign vessels within the harbour; (3) mixed civil or criminal cases arising on foreign property within certain districts outside the settlement limits. In purely Chinese cases, the "established practice" was discarded, and the foreign assessor sat only where the peace and order of the settlement was affected. In other cases, where a consular official was entitled by treaty to sit jointly with a Chinese magistrate, the powers of the assessors were confined to those conferred by the Treaty. In 1930—and here we may turn to Mr. Justice Feetham's Report for the completion of the story—the Provisional Court was, in turn, superseded by a District Court and a Branch High Court, forming part of the new Chinese judicial system. From these courts, foreign participation has disappeared.

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[1] *Revision Clause in Chinese Treaties.* Keeton, *British Year Book of International Law*, 1929, p. 119.

The kaleidoscopic changes in the situation in China render, at present, any serious forecast of the future of exterritorial jurisdiction in that country well-nigh impossible. An *impasse* has been created by the insistence of the British Government, on the one hand, on the exclusion of Shanghai, Tientsin, Canton and Hankow from the scope of the negotiations for the abolition of exterritoriality, and by the promulgation by the Government of Nanking, on the other, of regulations for the exercise of jurisdiction over foreigners.

These regulations were promulgated on May 4, 1931, by mandate. They comprised 12 articles and were intended to come into force on January 1, 1932.

On December 29, 1931, however, the Chinese Government issued a further mandate postponing *sine die* the enforcement of the mandate and regulations of May 4. This mandate stated that owing to calamities and trouble in various parts of the country, it had not been possible to complete the necessary arrangements for putting the new regulations into operation, and they were therefore temporarily postponed ; the authorities concerned were, however, ordered to complete these arrangements as soon as possible in order that a date might be fixed to bring into effect the provisions in question.[1]

The first step in the gradual abandonment by the foreign Treaty Powers of their exterritorial privileges in Siam was taken by Great Britain in 1883. The Anglo-Siamese treaty of that year provided that all cases, civil and criminal, arising in three northern provinces of Siam, between British subjects, or in which a British subject might be complainant, accused, plaintiff, or defendant should be tried by a special court—called the "International Court"—sitting at Chiengmai and composed of Siamese judges. The resident British consul was, however, empowered to be present at the trial of all cases affecting British subjects : he had the right at any time before judgment to "evoke" out of the Siamese court any case in which a British subject might be defendant or accused, in which event it would be transferred forthwith for adjudication to the British consular court at Chiengmai : an appeal lay in every case to Bangkok ; if the defendant or accused were a British subject, the final decision rested with the British Consul-General. Similar agreements recognizing the jurisdiction of the International Court of Northern Siam were reached with France (Convention of February 13, 1904), and with Denmark and Italy in 1905. A new phase in Siam's struggle for territorial sovereignty was marked by her treaties with France in 1907 and England in 1909.

By the treaty of 1907, France agreed to the extension of the jurisdiction of the International Courts throughout Siam, as regards all her subjects and *protégés* of Asiatic origin, registered at the French consulate before March 23, 1907. In 1909, Great Britain accepted the same extension in respect of British subjects registered at the British consulate before March 10, 1909. Both treaties preserved the right of "evocation," and stipulated for the presence of a European judge in all cases in which the defendant or the accused was a pre-registered subject. In both, post-registered subjects were amenable to the jurisdiction of the ordinary Siamese courts, without any right of evocation. Both provided that, on the promulgation and coming into force of all the codes of law in course of preparation under the auspices of a Commission of French and Siamese jurists, the right of evocation should cease and the system of International Courts come to an end.

After the close of the Great War, in which she had espoused the cause of the Allies, Siam, like China, was relieved from the fetters of exterritoriality so far as Germany, Austria and Hungary were concerned. Soviet Russia renounced exterritorial rights. Elsewhere the old system of exterritorial jurisdiction survived and seemed difficult to move. The Siamese-American Treaty of 1920, however, abolished it, subject to a reservation of the right of evocation for a period of five years after the promulgation of all the new Codes. The example of America proved contagious. The model of the Treaty of 1920 was followed by Japan in 1924, and by France, the Netherlands, Great Britain, Spain, Portugal, Denmark, Sweden, Italy, Belgium and Norway between 1925 and 1927. Siam's long fight for jurisdictional autonomy has thus now, to all intents and purposes, ended in victory.

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[1] Up to the present (October 1933) nothing further has been heard of the regulations.

The capitulatory system was originally imposed on the foreigner as a penalty. It was guarded by him as a privilege. It has come now to be viewed by the few countries in which it is still in force as a burden too heavy for them to bear. The important part that it played in the commercial development of the East must be frankly acknowledged. Its pressure, constantly exercised and constantly felt, has acted as a spur to prick the sides of Oriental Governments to induce them to pursue the paths of legislative, judicial and administrative reform. But, on the other hand, the capitulatory system is open to many objections. Even the foreigner is inconvenienced by the restrictions on travel, trade and residence which sometimes counterbalance the privileges that he enjoys. It has long, for instance, been the policy of China that, until exterritoriality has been abolished or modified, she will not throw open her entire territory to foreign trade or commerce. But in the case of countries granting exterritorial rights, the disadvantages are many and obvious.

The capitulatory system places irksome limitations on the law of territorial sovereignty, which since 1648 has been dominant in Europe. No independent State can be expected to regard with favour the indefinitely prolonged existence in its midst of groups of foreigners enjoying the immunity from taxation and the kind of "inviolability of domicil" which the Capitulations secured. The *protégé* system is admittedly indefensible, and it is fair to add that a number of Powers took steps to remedy it before its formal condemnation in recent treaties.[1] But the worst evil of all is the multiplicity of courts and the diversity of laws which exterritorial jurisdiction involves. Sometimes the tribunal is accessible only at utterly disproportionate trouble and expense.

"I remember" (writes Sir Skinner Turner,[2] formerly judge of the British Supreme Court for China, and British Commissioner on the Commission on Extra-territoriality in China),

> a sitting in Harbin in the depth of winter to try one murder case. This meant a journey of some 3,000 miles altogether by sea and land: in addition to the court staff, I had to take with me the Crown Advocate to prosecute and a

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[1] As at the Conference of Madrid, 1881.

[2] *Exterritoriality in China. British Year Book of International Law*, 1929, p. 60.

lawyer to defend: and as the prisoner was convicted he had to be brought back to Shanghai under escort. The case lasted one day only. Even the journey from Shanghai to Hankow to try any case outside the jurisdiction of the Provincial Court involves a week's travel, while to Canton it was even further, as that meant a change at Hong Kong.

Despite the ultimate success that attended Turkey's repudiation of the capitulatory system in 1914, the abrogation of exterritorial jurisdiction has not generally been thus attained. Various circumstances, most of which have already been noted, combined to assist the revolt against the capitulations—the withdrawal of their privileges from Germany and Austria, the renunciation of them by Soviet Russia, the emergence, after the Great War, of "succession States," which were not in a position to claim them, their suspension during the period of Mandates of the A class [1] and the agreement for the prospective abolition of the whole system in the Treaty of Lausanne. But the talisman in whose presence capitulatory immunities shrink into nothingness is the determination of the States subject to them to secure and preserve, alike for themselves and for the strangers within their gates, just laws, an enlightened and independent judiciary and stable government. The *peau de chagrin*, in Balzac's immortal tale, offered a stout resistance to mechanical violence but responded readily to every exercise of the human will.

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[1] After the repudiation of the Capitulations by Turkey in 1914, the Consular and Mixed Courts ceased to function as of right in all parts of the Empire, subject to effective Turkish domination. But exterritorial jurisdiction was provisionally maintained by France in Syria and Lebanon. Arts. 5 & 6 of the French Mandate of August 12, 1922, provided for the suppression of the Capitulations whenever the Mandatory had established a judicial system securing the rights alike of natives and of foreigners. Under the Palestine Order in Council, 1922, s. 58, the Civil Courts exercise jurisdiction over foreigners. Foreigners accused of offences have the right to claim trial by a British magistrate, and other analogous privileges. The Capitulations have been abolished by the Anglo-Iraqi Agreements of March 25, 1924, in Iraq, and March 4, 1931 (Cmd. 3839).

# A COMPARISON OF THE GENERAL PRINCIPLES OF CRIMINAL LAW IN ENGLAND WITH THE *PROGETTO DEFINITIVO DI UN NUOVO CODICE PENALE* OF ALFREDO ROCCO. V.

[*Contributed by* W. T. S. STALLYBRASS, ESQ., D.C.L.]

I HAVE now summarily discussed most of the general principles of criminal liability contained in Libro Primo of the *Progetto* with reference to English criminal law and tried to show how they appear to a normal English lawyer. There are numerous other topics in Libro Primo, the consideration of which would be at least equally interesting and profitable. There is the whole field of punishment. It was strange that at the same moment in history Italy, which not so many years ago had altogether abandoned the death sentence, should have been contemplating its introduction for some twenty different offences whilst there was a committee sitting in England to consider the abolition of capital punishment for the one offence for which for practical purposes in time of peace it is still retained! The whole carefully considered proposals for the treatment of recidivists, and habitual and professional criminals, deserve the most careful consideration in England, where considerable doubts exist as to the success of our own experiments in that direction. So the juridical systematization of "measures of security" which Ferri describes[1] as the "pre-eminent and fundamental excellence of the Rocco Project," based on the principles of the Positivist School, may well afford a model for other countries. It is interesting to note that just as the old common-law rule that neither the Crown nor any servant of the Crown had any right to expel a foreign criminal from the country[2] was found unsatisfactory and was modified by the Aliens Acts of 1905 and 1914, so the *Progetto* departs from the principles of the Zanardelli code and extends[3] the system of deportation, which is already in force under *legge speciale* and was proposed in the Ferri Project.[4] Another new departure of great interest is the introduction of a well-considered scheme of accessory punishments.[1] Amongst these, however, there is one which will not approve itself to English opinion notwithstanding Rocco's plausible justification for it[2]—the general forfeiture of goods.[3] In spite of the provision[4] enabling the judge to assign to near relations in need an annual subsidy out of the assets, it seems a retrogressive step to make the children or the wife pay for the sins of the father or husband. The horrors of the *peine forte et dure*[5] were due to a similar provision in English law in the days when it was still barbarous, and in spite of Lord Hardwicke's championship[6] of forfeiture in treason cases English opinion has unanimously endorsed the action of the legislature in entirely[7] abolishing general forfeiture in 1871. It would seem wiser, as Battaglini suggests,[8] to substitute a juridical condition similar to that of succession *ab intestato*.

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[1] *Principii di Diritto Criminale*, 829.

[2] Dicey, *Law of the Constitution* (8th ed.), pp. 220–1; Archbold, *Criminal Pleading* (26th ed.), 236.

[3] Art. 241; *Relazione*, i, 277–8.

[4] Ferri, *Principii di Diritto Criminale*, pp. 708–9. On the whole topic see the exhaustive discussion by Ch. de Boeck, *L'Expulsion et les Difficultés internationales qu'en soulève la Pratique* in *Recueil des Cours de l'Académie de Droit international*, vol. xviii (1927), p. 447.

On the other hand the admirable provisions of Articles 191 to 204 securing restitution and compensation for injured parties stand in bold relief against the extremely unsatisfactory condition of things in England, where the injured party in the great majority of cases of serious crime is unable to obtain any redress at all. Excellent too in the same line are the provisions as to the work and remuneration of convicted persons, whereby a convict pays for the damage he has done and for his own maintenance, yet has an opportunity of saving something for his own benefit.[9]

The elaborate provisions[10] as to aggravation and extenuating circumstances find no place in English law, where (except in the case of murder) there is no downward limit to the exercise of a judge's discretion. But the *Progetto* makes a big advance in giving the judge a greater discretion than he has hitherto possessed in Italy, in spite of the precision of the rules[11] for the exercise of that discretion.[12] A very competent Italian lawyer writes[13] of the new project: "the task of the magistrate is enlarged in a truly notable manner. He requires culture, sagacity, and penetration much greater than before to catch with exactness the different aspects and subtle *nuances* of facts. He ought to become a little like the English judge. Juridical culture and judicial mentality are much less sufficient for him than before (the magistrate in general can no longer be a mere jurist): he must gradually more and more possess greater technical knowledge in matters of psychology, sociology, mental medicine, etc. It is objected that with such individualization of justice too great a field is opened for discretion . . . The good sense of the magistracy is traditional. A simple regard to the annals of jurisprudence convinces one that in general it is *the solution which most answers to common sense* that prevails. The laws may even be defective, but the good sense of the magistracy is undeniable."

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[1] Arts. 19, 28–42. [2] *Relazione*, i, 74–5. [3] Art. 29. [4] Art. 30.

[5] Kenny, *Outlines* (12th ed.), p. 473.

[6] *Some Considerations on Forfeiture for High Treason.*

[7] I do not know why Rocco says (*Relazione*, i, 74) that the abolition was only partial.

[8] *Principii di Diritto Penale*, i, 155–6. Cp. Beccaria, c. xvii.

[9] Cp. Parsons, *Responsibility for Crime*, ch. 9. [10] Arts. 63–74, 116, 117.

[11] Arts. 136–144. As to the dangers involved in the mechanical nature of such individualization, see Glueck in 41 *Harvard Law Review*, pp. 470–9.

[12] Battaglini, *Principii di Diritto Penale*, i, 156. [13] *Ibid.*, i, 236–7.

The tribute paid in this passage to our English judges and magistrates is pleasing to an Englishman, but it is none the less justified. The excellence of our judicial authorities is the reason that in England we are more than content to leave the *maximum* of discretion to them in determining the punishment, and to have no *minimum* fixed by law.[1]

But in one respect the judges have more power under the *Progetto definitivo* than in England; by Article 148 the supervision of the execution of the sentence is entrusted to the judge. It is for him to decide about the admission to work in the open, and to advise upon the admission to conditional release.[2] This is a step towards the individualization of punishment which ought to receive serious attention in other countries such as our own.[3]

Apart from these vital questions of punishment, it would have been interesting to have discussed the institution of proceedings, which is in England in general (at least in theory) left to the private citizen, in Italy in general undertaken by the State, and the *remissione della querela*, which is repugnant to the English conception of crime; to have considered the provisions[4] relating to incitement, conspiracy and joint crimes; to have compared the difference between *delitti* and *contravvenzioni* with the difference between felonies and misdemeanours; and finally to have examined the criminal responsibility of corporations which, whether or not they have a will to commit a crime,[5] certainly have no body to be imprisoned—a subject not expressly dealt with in the *Progetto definitivo*, although special provisions are made in Articles 61 and 62 as to offences committed by means of the press.[6]

All these (and others) are matters of vital importance, and on all the *Progetto* is very suggestive, but they are outside the scope of this paper.

I have criticized some of the provisions of the *Progetto Rocco*, but there is far more in it to praise than to censure. To what extent it is possible for England, firmly based upon a system of case-law (English law is refractory to codification[7]), to adopt from it what is good it is not for me to say. But above all we must be grateful to the *Project* for once more asserting the moral responsibility of human beings, for reasserting the dignity of man. Man is once more proclaimed to have "coscienza e volontà." It is a mistake, as Bentham and his followers did, to regard criminal law as independent of morality, to regard, as did the Positivist School, criminals as specimens to be classified and docketed and placed in a museum. Criminal law must be based on the principle that it is right to hate criminals; "the proper attitude of mind towards criminals," said [1] one of England's greatest lawyers and judges," is not long-suffering charity but open enmity; for the object of the criminal law is to overcome evil with evil." Criminal law has a close relation to morality. Punishment is not purely imposed as a deterrent; it is in part based upon moral sentiment. For the authoritative reaffirmation of that great truth we must, if there were no more, be grateful to the *Progetto Rocco.*

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[1] Any extreme divergences in the exercise of the discretion are controlled by the Court of Criminal Appeal, or in the case of courts of summary jurisdiction by Quarter Sessions. See Note B.

[2] Art. 144.

[3] See Saleilles, *Individualization of Punishment.*

[4] Arts. 119–23.

[5] Cp. Ferri, *Principii di Diritto Penale*, p. 399; Winn in 3 *Cambridge Law Journal*, pp. 405 sqq.; Street, *Doctrine of Ultra Vires*, p. 269 (1930); Battaglini in *Rivista Italiana di Diritto Penale* (1930).

[6] Contrast Archbold, *Criminal Pleadings* (26th ed.), p. 1252; Dicey, *Law of the Constitution*, pt. ii, c. vi.

[7] Battaglini, *Principii di Diritto Penale*, i, 180.

The *Progetto Rocco* is the result of long, careful and single-minded labour and thought to a great end—the improvement of the criminal law by the reassertion of the responsibility of human beings. As such it will win the unstinting admiration of the civilized world. The testing-time for it and for Italy will come when the new code is put into force.

An able writer in 1928 said [2] of Rocco's *Project*: "Where one is inclined to be most sceptical about the new penal code, is perhaps in the essentially political character which the legal body assumes, since all its members have to be members of the Fascist party. In the last five years every barrister, magistrate and judge who has been considered by the Government as insufficiently Fascist has been suspended from office. This whole problem, however, is intimately bound up with the evolution of that party into a State system; a process that is gradually going on in modern Italy." And the scepticism of the English-speaking world as to the Moscow and Leipzig trials was due more than to any other reason to the political character with which the tribunals were vested.

I have often in this paper had to compare our English laws unfavourably with the proposals of the new Code, but a very competent and by no means uncritical French student of English institutions, Dr. Seitz, recently wrote: [3] "Les mérites du système judiciaire anglais tiennent plus à la valeur des magistrats qu'à celle des institutions. C'est le plus bel éloge que l'on puisse en faire." There is a favourite quotation amongst Englishmen:

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[1] Stephen, *History of Criminal Law*, ii, 179.

[2] S. E. Saunders in 165 *L.T.Jo.*, p. 309.

[3] *Les Principes directeurs de la Procédure criminelle de l'Angleterre*, p. 322. He also says (pp. 322–3): "Le magistrat anglais se recrute parmi les avocats. Ceux-ci, dont la science est indéniable, mais qui sont peu embarrassés de doctrines juridiques, ont une grande expérience des affaires, un esprit prompt et droit, une parfaite honorabilité et, par-dessus tout, des habitudes d'indépendance absolue. Aucun magistrat n'est capable de faire la moindre concession à la plus importante influence. Le juge anglais ne rend compte de ses arrêts 'qu'à sa conscience et à Dieu' . . . Les juges anglais se distinguent par deux autres qualités: la simplicité et l'urbanité. Ils ne sont ni gourmés, ni pompeux, ils évitent tout apparat inutile. A l'audience, ils sont toujours d'une extrême aménité, d'un abord facile et bienveillant, surtout pour les humbles, et nul d'entre eux ne se permettrait d'interpeller accusés ou témoins en termes discourtois."

> "Whate'er is best administered is best";

and every Englishman will hope that the administration of the *Progetto Rocco* will be worthy of its design.

## NOTE A

The difficulty of distinguishing between mistake of fact and mistake of law and the uncertainty in the law resulting from this difficulty are illustrated by the following cases amongst others.

In the famous case of *R.* v. *Tolson*[1] a woman went through the ceremony of marriage within seven years after she had been deserted by her husband, in good faith and on reasonable grounds believing him to be dead. A majority of nine judges to four in the Court of Crown Cases Reserved held that she was not guilty of bigamy. Her mistake was a mistake of fact.[2] On the other hand in *R.* v. *Stocks and Wheat*[3] the Court of Criminal Appeal held that the prisoner was guilty of bigamy. He was an uneducated man who wrongly believed in good faith and on reasonable grounds that he had been divorced from his first wife when he went through a second marriage ceremony. Tolson did not intend to do the act forbidden by the statute, *i.e.* to marry another person during the life of the former husband, whereas Wheat did. Therefore he was guilty of an offence. His mistake was a mistake of law. So Earl Russell honestly believed his divorce was valid and that he was free to marry again, but it was not a defence and merely went in mitigation of punishment.[4] So in a recent case[5] the prisoner married in 1908 and separated from his wife in 1911. He did not see his wife for over seven years, and said to the Registrar: "I do not want to commit bigamy." The Registrar replied, "There is no question of that." There was *bona fide* mistake, and no deception of the second "wife," but the prisoner was guilty of bigamy. The Court of Criminal Appeal, however, reduced his sentence to one of seven weeks and one day, which involved immediate discharge from prison.

Dr. Stroud, after comparing the cases of *Tolson* and *Wheat* says:[6] "There is, in short, no rule that ignorance or mistake affords an excuse for what would otherwise be a crime; the so-called excuse of ignorance is merely an application of the general principle that no act is a crime unless the party subsumed the fact under the law, or might with due attention have done so. The law requires different degrees of attention in respect of different circumstances . . . The difference between the two classes of cases is, not that *mens rea* may be absent in the one and is requisite in the other, but that in the one case the law imposes an ordinary, and in the other an extreme, degree of care upon the person contemplating a second marriage." It would seem, however, more consistent with authority to hold that in one case the mistake is one of fact, in the other it is a mistake of law.

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[1] (1889) 23 Q.B.D. 168.

[2] Cp. Stephen J. at p. 188.

[3] [1921] 2 K.B. 119.

[4] [1901] A.C. 446.

[5] *R.* v. *Davis*, (1928) 20 Cr. Ap. R. 166.

[6] 37 L.Q.R., 492.

A recent decision [1] of Humphreys J. at the Manchester Assizes cannot, however, be so easily distinguished from *R.* v. *Tolson.* The prisoner married T in 1922. Soon after his marriage he found that T was receiving letters from G in India addressed to "his wife" from her "darling husband." The prisoner only lived with her for two months in 1927 and in April 1928 married B. In May T died. The prisoner could not prove the marriage in India, but he had a reasonable belief that T was married. It was held that he was guilty of bigamy. Marriage is a mixed question of law and fact depending on many factors. The case, if it is followed, makes a change in the law,[2] and seems irreconcilable with *R.* v. *Tolson.* It would seem that here the mistake is in truth one of fact.[3] The prisoner did not, if his *bona fide* and reasonable belief were correct, marry another person during the life of his former wife. Surely "wife" means "wife" in the primary, not in the secondary sense. And it would seem that the onus was on the prosecution to prove that he was in fact married when he went through the second ceremony.

Another line of cases illustrates a similar difficulty. S. 23 of the Larceny Act, 1861, provides that: "Whosoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law" shall be guilty of an offence. In *Taylor* v. *Newman* [4] Taylor was prosecuted for killing on his own land a pigeon which belonged to Newman, to whom he had given a warning that he would destroy his pigeons if they continued to come and feed on his land. The court held that the intention of the legislation was to bring pigeons within the law of larceny, and that therefore there must have been a guilty intention to deprive a man of his property in order to justify a conviction. In *Horton* v. *Gwynne* [5] the defendant shot a homing pigeon thinking it was a wild pigeon, and a Divisional Court held that he was guilty of an offence under the section. "His act was both wilful and unlawful. It was not accidental. It was not as if he had shot at a cow and killed a pigeon unintentionally . . . A person who shoots at a pigeon which turns out to be a house pigeon must take the consequences of his act."[6] And Avory J. expressed the view that in *Taylor* v. *Newman* "but for the fact that the appellant was there acting in defence of his own property the court would have held that the mere act of killing a house pigeon was an offence if the defendant killed what he shot at."[1] In *Farey* v. *Welch*[2] the appellant attempted to take away a pigeon belonging to the respondent, honestly believing it to belong to himself, and it was held by a Divisional Court[3] that no offence was committed under the section. There was no felonious intention of stealing; *Taylor* v. *Newman* was rightly decided. In the light of the later decision it is difficult to see how *Horton* v. *Gwynne* can still be law.

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[1] *R.* v. *Kircaldy*, (1928) 167 *L.T.Jo.* 46.

[2] *R.* v. *Thomson*, (1905) 70 J.P. 6 (Common Sergeant), *R.* v. *Connatty*, (1919) 83 J.P. 292 (Recorder of London), *R.* v. *Cunliffe*, (1913) 57 S.J. 345 (Bailhache J).

[3] Keedy is surely too sweeping when he asserts (22 *Harvard L.R.*, p. 77) that "whether a man and a woman are married is a question of law."

[4] (1863) 4 B. & S. 89.

[5] [1921] 2 K.B. 661.

[6] *Per* Darling J.

The difficulty of the law is further illustrated by a case which came before the Chief Justice of Trinidad six years ago. The prisoner had agreed to take two women in a boat out to a ship in harbour in consideration of receiving half the proceeds of the earnings of their immorality on board ship. They refused to pay and he forcibly took the money from them on the return journey. He was indicted for robbery and convicted, the Chief Justice directing the jury that even if (as alleged) he believed himself to have a right to take the agreed money from them it would be no defence in law to the charge. On appeal on a special case the conviction was quashed, because the question of felonious intent was not expressly left to the jury. It is difficult to say how this case would be decided in England. Does the rule in *Hargreaves* v. *Diddams*[4] and *Watkins* v. *Major*[5] apply where a specific intent is an element in the offence charged? Apparently not. Thus in *R.* v. *Hemmings*[6] the prisoner was indicted for robbing the prosecutor of a cheque and some money. The prosecutor owed the prisoner money and had promised to pay him £5. He was drinking at the inn kept by the prisoner when the latter pressed him for payment, and, on a refusal, induced him to go into a private room. The prisoner there repeated his demand for money, knocked the prosecutor down, and tried to take the money from him. The prosecutor said that if he would let him get up he would give him a cheque for £4, which he had on him, and did so. The prisoner was not content, repeated his demands and knocked the prosecutor down again, and the money dropped from his pockets. Erle C.J. said that it was rather an assault by a creditor on a debtor to enforce payment of a debt than a felonious robbery, that it was an unlawful proceeding but very unlike felony. It was impossible to find felonious intent on such facts. Very similar is *R.* v. *Boden*.[7] But the Trinidad case differs from these in an important element. There, there was no debt; the contract upon which the alleged debt was based was a nullity at law; *ex turpi causa non oritur actio*. Does that make any difference? As the authorities stand, it seems that the principle of *Hemmings* and *Boden* will carry even to such facts as these.

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[1] This does not seem to have been the true ground of the decision.

[2] [1929] 1 K.B. 388.

[3] Avory J. was again a member of the court, but said nothing as to *Horton* v. *Gwynne*.

[4] (1875) L.R. 10 Q.B. 582.

[5] (1875) L.R. 10 C.P. 662.

[6] (1864) 4 F. & F. 50.

[7] (1844) 1 C. & K. 395.

But the application of the whole law relating to *bona fide* claims of right and to questions of mixed fact and law bristles with difficulties.[1] And it is not possible to find the solution of all those difficulties merely by distinguishing between ignorance and mistake, terms which are usually used interchangeably,[2] but which in fact convey different ideas, as has been pointed out by E. R. Keedy.[3] " 'Ignorance,' " he says, " may be defined as lack of knowledge ; whereas a ' mistake ' is a wrong conclusion frequently caused by insufficient knowledge."[4] He holds that ignorance of law does not negative the criminal mind, whereas mistake of law does, and that, therefore, in the latter case the mistake should provide a good defence. " When the defendant errs in applying law to facts, thus reaching an incorrect conclusion, and then does an act which would not have been criminal if the conclusion were correct, he should not be convicted, because he does not have the guilty mind."[5] Unfortunately, in spite of the English[6] and American cases cited by Keedy in support of his proposition, it cannot be said that the authorities bear it out as a correct statement of the law. *R.* v. *Wheat*[7] is quite to the contrary.

The above observations and illustrations sufficiently show how unjustifiable it is to speak with dogmatic certainty as to the present law on this particular topic.

### NOTE B

It is perhaps worthy of notice that the creation of a Court of Criminal Appeal in 1907 with a power to review sentences has to a considerable extent substituted the discretion of the appellate court for that of the trial judge. The quantum of punishment still remains within judicial discretion, but the Court of Criminal Appeal has laid down certain general principles by which trial judges must be guided. The principles to which effect is given by the Court of Criminal Appeal do not go so far in the direction pointed out by the Positivist School as does Rocco's *Progetto*. Although in passing sentence regard must be had to the prisoner's character and antecedents, it has been frequently laid down that the punishment must also fit the crime. " When a man has committed serious offences and served long terms for them, it is not required that he should suffer further severe punishment for a later offence which does not intrinsically call for it," said Lord Hewart in one case,[8] and in another :[9] " There are serious objections to passing a severe sentence on a man because at some earlier time he has committed a grave offence."

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[1] Cp. *R.* v. *Denyer*, [1926] 2 K.B. 258 and the controversy which it has aroused. See Dr. Goodhart's discussion of the problem in *Essays in Jurisprudence*, c. ix.

[2] Blackstone, *Commentaries*, iv, 27.

[3] " Ignorance and Mistake in the Criminal Law " in 22 *Harvard L.R.* p. 75.

[4] *Op. cit.*, p. 90.

[5] *Ibid.*, p. 95.

[6] *R.* v. *Forbes*, (1835) 7 C. & P. 224 ; *R.* v. *Allday*, (1837) 8 C. &. P. 136.

[7] [1921] 2 K.B. 119.

[8] *R.* v. *Gumbs*, (1926) 19 Cr. App. R. 75.

[9] *R.* v. *D'Arcy*, (1926) 19 Cr. App. R. 122. Cp. *R.* v. *Walls*, (1925) 19 Cr. Ap. R. 35 ; *R.* v. *Knell*, (1926) 19 Cr. Ap. R. 169 ; *R.* v. *Watson*, (1927) 20 Cr. Ap. R. 119 ; *R.* v. *Woodward*, (1929) 21 Cr. Ap. R. 137 ; *R.* v. *Bray* (1931) 23 Cr. Ap. R. 30.

So also in the case of habitual criminals the trial judge is not entitled to pass a sentence of penal servitude in a case to which that sentence is inappropriate merely for the reason that it is an essential preliminary to passing a sentence of preventive detention. The court must think it right to pass a sentence of penal servitude in respect of the substantive offence of which he is convicted.[1] Again, even if a prisoner is convicted of being an habitual criminal, the judge may consider that the case does not merit preventive detention, in which case he must not order any. The judge, in the exercise of his independent discretion, must be of opinion that by reason of the criminal habits and mode of life of the prisoner it is expedient for the protection of the public that he should be kept in detention for a lengthened period of years.[2]

Again, habitual criminality does not create a status. It is not true that once an habitual criminal a man is always an habitual criminal. The Court of Criminal Appeal so decided by eight judges to four in *R.* v. *Norman.*[3] Lord Hewart in giving the judgment of the majority of the Court said: " A man of 50 years of age may be found to have been three times convicted of crime between the ages of 16 and 25 years, and the evidence may prove that he is leading persistently a dishonest life by persistently pretending to be in Holy Orders or to be a qualified medical man. Yet the jury might say, and say properly, that he was not the sort of person the Act was aimed at, and that he ought not, because he had committed some fresh offence, to be found to be an habitual criminal."

With these elastic principles may be contrasted the rigidity of the *Progetto.* " Whoever, after conviction for an offence, commits another offence, is liable to an increase up to one-sixth of the punishment fixed for the new offence. The punishment is increased up to one-half: (1) if the offence is of the same character; (2) if the new offence was committed not more than five years from the previous conviction,"[4] and so forth. Or again: "A person is declared an habitual criminal who, after having been sentenced to imprisonment for terms not exceeding five years, for three crimes, intentional or preterintentional (*non colposi*), of the same character, committed within ten years and not simultaneously, receives another sentence for a crime, intentional or preterintentional, which is likewise of the same character, and which has been committed within ten years of the last of the previous crimes." The time during which the person was serving his sentence or was subjected to detentive *misura di sicurezza* is not counted in these periods of ten years.[5]

(It will be noticed that in Italy as in England " once an habitual " does not mean "always an habitual."[1]) In other cases under the *Progetto*[2] the judge has a discretionary power of finding a prisoner an habitual offender if he has already been sentenced for two crimes, intentional or preterintentional, and is further sentenced for an intentional or preterintentional crime, if the judge, having regard to the character and gravity of the crime, the time between their commission, the conduct and the manner of living of the offender and so forth, is of opinion that he is addicted to crime.

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[1] *R.* v. *Paul,* [1925] 1 K.B. 77; *R.* v. *Donovan,* (1925) 19 Cr. Ap. R. 2; *R.* v. *Turnbull,* (1926) 19 Cr. Ap. R. 155; *R.* v. *Harry,* (1928) 21 Cr. Ap. R. 21.

[2] *R.* v. *Paul,* [1925] 1 K.B. 77.

[3] [1924] 2 K.B. 315, over-ruling *R.* v. *Stanley,* [1920] 2 K.B. 235.

[4] Art. 102.

[5] Art. 105.

It is clear, then, that the trial judge in England no longer has such an unfettered discretion in passing sentence as he had before 1908. It is also clear that in the exercise of his discretion he will be compelled to have regard not only to the criminal but to the crime. The teaching of the Positivists, such as Ferri, has made a far deeper impression upon Italian lawyers than it has upon our own criminal judges. Public opinion in England is scarcely ready yet for the reception of so much positivist doctrine as has been received in the *Progetto Rocco*. Judges cannot travel far in advance of public opinion. But it is rather disquieting that the Court of Criminal Appeal should carry to the extent to which they have their insistence on the principle that the punishment shall fit the crime. The increase of burglary, housebreaking and so forth of recent years suggests that all is not as it should be.[3] The continual denunciation of short sentences by those best qualified to express an opinion leads one to believe that in the interests of the State greater attention must be paid in the future to the dangerousness (*pericolosità*) of the offender than has been paid in the recent past. Sometimes it would seem that the judges in the Court of Criminal Appeal have had more regard for the immediate interests of the criminal than for the security of the community, and have allowed their compassion for the accused (often the victim of heredity or environment) to carry them farther on the course of a perhaps misguided humanitarianism than is either demanded by public opinion or consistent with the welfare of the community.

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[1] See, however, *Relazione*, i, 149.

[2] Arts. 107, 137.

[3] McCardie, J., in one case referred to "the unfortunate effect of unnecessary reductions of sentences by the Court of Criminal Appeal." Hewart, L. C. J., in that Court on appeal naturally said: "This Court never reduces a sentence unless the reduction is necessary, and where the reduction is necessary in the interests of justice, this Court is by statute required to reduce it." *R.* v. *Griffiths*, (1932) 23 Cr. Ap. R. p. 155. But the right quantum of punishment is not (according to English ideas) ascertainable by pure mathematics or set formulæ. It is a question upon which there must inevitably be differences of opinion.

# THE NEW GERMAN COMPANY LAW AND THE ENGLISH COMPANIES ACT, 1929—III.

[*Contributed by* DR. RICHARD ROSENDORFF, *Rechtsanwalt, Berlin.*]

**Disclosure of Facts, especially Information given at the General Meeting.**—The new law regards a "substantial extension of the duties concerning publicity as a prerequisite for the reconstruction of confidence in German companies." The present state of affairs is looked upon as wholly unsatisfactory and reference is made to the extensive publicity required in America and to the new law in England. It has been suggested that Germany for the sake of her credit should follow the same lines. In this way the law would carry out the desire which has long been expressed by public opinion as well as by leading men in the economic world. Thus Jacob Goldschmidt, former managing director of the Darmstädter and National Bank, in his address delivered at the seventh General German Bankers' Conference, asked that companies should give up the practice of hiding their profits from the public. The extension of publicity is aimed at by the following provisions:

**Extension of the Contents of the Annual Return.**—The new provisions concerning the annual return are of greatest importance and read as follows (s. 260*a*):

(1) The annual report must show the state of affairs and the financial position of the company and comment on the yearly balance sheet. In dealing with the balance sheet deviations from the previous balance sheet are to be discussed.

(2) In the annual return relations to associated and subsidiary companies are to be reported on.

(3) The annual return must further contain particulars with regard to: (*a*) shares which have been taken over by a shareholder on the account of the company in his capacity as promoter or subscriber; in case such shares in the course of the business year have been disposed of, the sale of these shares and the use made of the proceeds of the sale are to be reported on; (*b*) the amount of a company's own shares which the company or somebody else possesses on the company's account. If such shares during the course of the business year have been purchased or disposed of the price paid for or received and the use made of the proceeds of the sale are to be reported on; (*c*) shares the disposition of which is restricted by expressed or tacit agreement in favour of the company or a subsidiary or associated company. The restriction may

be in regard to the rights to which a shareholder is entitled or to the sale or any other disposition of the share ; (*d*) redeemable shares issued in the course of the business year ; (*e*) any liabilities including mortgages and transfer of ownership by way of security which do not appear on the balance sheet as well as other responsibilities resulting from the negotiation of bills or cheques ; (*f*) the total amount of the remuneration of directors or members of the supervisory council (salary, remunerations consisting of a share in the profit ; compensations for necessary expenses ; commissions and incidental payments) ; (*g*) the connexion which the company has with any associations which regulate prices or market conditions ; (*h*) any important events which have happened after the period covered by the report.

(4) The report is to be drawn up according to the principles of correct accounting. This may, however, be dispensed with to such extent as may be required by the interests of the company or by public interests.

These provisions may be compared with those of ss. 108–111 of the English Companies Act, 1929, as to the particulars to be contained in the " Annual Return."

**Balance Sheet, Profit and Loss Account.**—As is well known, the question of the contents of the balance sheet, as well as the profit and loss account, has been widely discussed in all countries undertaking the reform of company law.

(1) **Secret Reserves.**—The greatest interest centres round the question of secret reserves. The law does not prohibit the formation and distribution of secret reserves for the reason that such prohibition would violate the interests of economy. It has also refrained from solving this question according to the example of the Swiss Draft (s. 664) and instead has left the prevailing state of law unaltered, according to which secret reserves are admitted under certain conditions.[1] The law differs from the former law (s. 113, para. 3, sen. 3) only in prohibiting reserves from being entered on the credit side of the accounts as has frequently been done in Germany up to now.

(2) **Principles of Valuation.**—In the new German law the following provisions are made with regard to valuation of the different items of the annual balance sheet.

Investments and other assets of the company destined to serve permanently the business interests of the company may be entered at their purchase price or their cost of production price if the amount of depreciation, calculated for the period covered by the balance sheet according to the total period of use or depreciation, is written off or assessed in the form of an adjusting account. When calculating the cost of production a reasonable amount of depreciation may be written off as well as an appropriate portion of the cost of administration and management. Expenses for sale are not to be considered as part of the cost of administration and management.

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[1] For full particulars see : Rosendorff, *Das Neue Deutsche Aktienrecht.* 2. Auflage.

Securities destined to serve permanently the operation of the company may be entered at their invoice price if the principle of orderly accounts does not require the depreciation of the invoice cost.

(3) **Contents of Balance Sheet.**—The German Commercial Code contained no provisions as to contents of the balance sheet. Following the principles of the new English Companies Act, s. 261 (*a*) contains specific provisions as to the contents of the yearly balance sheet. The yearly balance sheet, apart from such more detailed statement as may be required by the nature of the enterprise, must specify the following particulars separately. The list of assets must include:

(1) The amount of the unpaid share capital of the company.

(2) Property: (*a*) real property, not comprising buildings; (*b*) buildings: (i) business and dwelling houses, (ii) factories and other premises; (*c*) plant and machinery; (*d*) tools, implements and business equipment; (*e*) concessions, patents, licences, trade-marks and other similar rights.

(3) Participations, including any securities serving for such purposes. Shares in a company, the nominal value of which amounts to 25 per cent. of the stock capital of the company in question and mining shares the total amount of which is 25 per cent. of the shares in such mines, are considered as participation.

(4) Circulating capital: (*a*) raw and auxiliary material, working stock; (*b*) half-finished products; (*c*) finished products, stock; (*d*) securities as far as they do not come under No. (3) or (4) (*e*) (*l*) or (*m*); (*e*) shares of a company owned by the company itself and their nominal value; (*f*) any mortgages, charges and other encumbrances due to the company; (*g*) account payments made by the company; (*h*) outstanding moneys on ground of goods supplied or services rendered; (*j*) debts due to the company from subsidiary or syndicated companies; (*k*) debts due to the company from members of the Board of Directors or legal representatives of an enterprise which is dependent upon the company that is entitled to a claim, as well as from the respective husband or wife or a minor child or from a third person who acts on account of one of these persons; (*l*) bills of exchange; (*m*) cheques; (*n*) cash in hand, including any accounts with note-issuing banks, and postal cheque accounts; (*o*) other banking accounts.

(5) Items which serve the balancing of the accounts: (*a*) stock capital; (*b*) reserves: (i) obligatory legal reserves, (ii) voluntary or other kinds of reserves; (*c*) adjusting accounts; (*d*) depreciation accounts; (*e*) liabilities.

On the side of the liabilities there are to be specified as debit items the following: (*a*) loans of the company together with a statement of what mortgages, if any, have been given as security; (*b*) mortgages existing on the real property of the company as far as they are not security mortgages or serve as a pledge for loans; ground charges and other encumbrances; (*c*) account payments made by customers of the company; (*d*) liabilities for goods delivered or services rendered; (*e*) liabilities towards subsidiary or associated companies; (*f*) liabilities for bills drawn or accepted; (*g*) liabilities towards banks.

Regarding invested capital the credit and debit items in respect of the individual entries are to be specified. The setting off of claims and liabilities is not admissible. The same applies with regard to rights or charges on real property which are not based on a personal claim. The amount of the reserve accounts, the sums set aside for special risks and the adjusting accounts shall not be stated under the liabilities of the company. If claims or liabilities appear under different headings, reference is to be made under each mention of the same items to their respective co-items, as far as this is required by the principle of correct balancing.

Shares of the company owned by the company itself must not be listed under some other heading.

(4) **Contents of Profit and Loss Account.**—The English Companies Act, 1929, deals also with the questions of the contents of the profit and loss account. Under the former law it was thought sufficient that an independently audited balance sheet summarizing the assets and liabilities of a company be placed before the general meeting and then made public. Assets and debts were grouped together so that the true position of the company's affairs could not readily be ascertained. Therefore it was thought desirable to provide definite rules in regard to the form of the balance sheet. The matter of accounts was, however, considered by the Greene Commission to be one in regard to which "within reasonable limits the companies should be left a free hand." The Commission dealt with the question of the accounts of holding companies with particular care, especially as to whether the said holding companies should be required to publish a consolidated or combined balance sheet for the whole group of companies. The new legal provisions are contained in ss. 123–7 of the Companies Act, 1929. The directors are required to lay before the company in general meeting a balance sheet as at the date to which the profit and loss account is made up, to which shall be attached a report by the directors with respect to the state of the company's affairs, the amount which they recommend should be paid by way of dividend and the amount which they propose to carry to the reserve fund. The Act also contains special provisions as to subsidiary companies or holding companies.[1]

According to the former German law it was sufficient if there was a general survey of the total results, whereas now s. 261 (*e*) contains the following rules:

In the profit and loss account, apart from such more detailed or different specification as may be required by the object of the undertaking, the following items must be specified on the side of the expenses:

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[1] See paragraph on Holding Companies, p. 250.

(1) wages and salaries; (2) social burdens; (3) depreciation of property; (4) interest as far as the same exceeds the rate of interest received; (5) property tax of the company; (6) all other expenses excepting those incurred with regard to raw material, auxiliary material and working stock or as regards commercial undertakings any expenses incurred for goods purchased.

On the side of the profits there are to be specified: (1) the amount resulting after the deduction of the outlay for raw and auxiliary material or working stock (in case of a commercial undertaking after the deduction of the outlay for the goods purchased) as well as of those returns which have to be specified in 2-5 below: (2) profits of participations; (3) interest as far as the same exceeds the rate of interest paid, and other profits of capital; (4) extraordinary profits; (5) extraordinary bequests.

**Extension of the Right of Shareholders to obtain Information at the General Meeting.**—Ss. 86-91 of the German Draft contains a number of rules in this respect. These provisions have not yet been embodied in the emergency measures, but are to be left to the decision of the ordinary legislative bodies.

Each shareholder may at the general meeting require full information on such affairs of the company as are being discussed. As far as these affairs are materially influenced by the relations existing with another undertaking the latter are to be reported on as well. This applies especially to the relations with a subsidiary company. If the Board of Directors refuses to give the required information, the information shall not be given unless a minority of not less than one-tenth of the stock capital supports the request. Information may be refused only when the predominating interests of the company or public interest demands it. If the information given does not comply with the provisions just mentioned or if it is refused, further discussion of the matter may be postponed at the request of a simple majority, or even at the request of a minority representing not less than 10 per cent. of the stock capital in case the said minority has had possession of its shares for not less than three months prior to the annual meeting. If discussion has been postponed at the request of a minority, no further postponement may take place if an arbitrator, to be appointed according to ss. 88-92, has certified that the information was rightfully refused, or that at the previous meeting or since it has been correctly and fully given, and if a certificate stating the same is laid before the new general meeting. Nor can a further postponement be asked for by the minority if the question on which information is demanded could have been put at the former meeting. If a resolution is opposed by an action as foreseen in s. 86 the company may ask for the decision of an arbitrator. No details are contained in the Draft with regard to such arbitration. The administration may also refer the matter to an arbitrator even when no action has been formally filed against it. Both parties are to be heard by him and his decisions are final and binding.

**Examination of Books and Accounts by Auditors.**—For many years in Germany the question has been discussed whether it would not be advisable to follow the example set by the legislatures of many foreign countries such as France, Switzerland, Poland, and especially of England, and to introduce an examination of the books and accounts of each company by auditors. The new German law follows the English precedent.

S. 262 (*a*) provides that the annual return, *i.e.* the balance sheet and the profit and loss account, including the books and the annual report, shall be examined by one or more expert auditors, before it is laid before the general meeting. This examination consists not only in checking the figures of the balance sheet, but also includes an examination into the facts behind the books.

The auditor or auditors are to be appointed at the annual general meeting and are to hold office for one business year. To secure the appointment of suitable auditors it is provided that the members of the Board of Directors, the Board of Control or a minority holding not less than 10 per cent. of the stock capital, may place on record an objection to the appointment, in which case the courts are to decide as to the suitability.

Only such persons may be appointed auditors as have had full training and sufficient experience in accounting. The same applies with regard to trust companies and their directors of whom one at least must possess the training and experience qualifying him for the audit. Auditors likely to be under the influence of the company are not to be appointed—a provision of special significance for the *Treuhandgesellschaften* affiliated to the big banks. Nor is a director, a member of the supervisory council or an officer of the company eligible for appointment as auditor of the company.

It was not strictly necessary to provide legally for this, as the inadvisability of appointing such persons as auditors is evident. The English Company Act, 1929, s. 133, however, contains similar provisions. In Germany a body corporate is qualified for appointment as auditor, but not in England.

In England the auditor of a company has a right of access at all times to the books and accounts and vouchers of the company. He is further entitled to require such information and explanation as may be necessary for the performance of his duties.

Moreover, the auditors are to report the results of the examination and the report is to be laid before the Board of Directors (s. 134). The English Act further provides that the auditors of a company shall be entitled to attend every general meeting of the company at which the accounts examined or reported on by them are to be laid before the company and to make such statement or explanation as they desire with respect to the accounts. The German legislator also considered the advisability of a direct report of the auditors to the general meeting, but refrained from such a step, fearing that it might be of disadvantage to the company's interest.

In other respects also the German law differs from the English. The English law does not require a detailed report. A certificate suffices stating that the balance sheet is so drawn up as to exhibit a true and correct view of the company's affairs. In addition to this the German law requires a detailed report containing all particulars in respect to the state of the company's financial situation.

The auditors are to report according to the best of their information, conscientiously and impartially, and to handle the information they get with discretion. They are liable for any damage resulting from their negligence or breach of duty. This liability, however, is limited to 100,000 marks for each person.

The case of the City and Equitable Fire Insurance Company led also to the insertion of provisions in the English Act of 1928 (reproduced as s. 152 of the Act of 1929) making void articles of a company or contracts with a company whereby auditors were indemnified against any liability arising out of their negligence, default, breach of duty or trust.

In the opinion of German legal authorities the introduction of the audit is the most significant and important item in the reform of the Company law up to now.

**The Purchase of its Own Shares by the Company.**—The question whether and in what circumstances a company is allowed to purchase its own shares is regulated in the law of almost all countries. In Germany s. 226 of the Commercial Code formerly provided that a company was not allowed in the ordinary course of its business to purchase or take as mortgage its own shares with one exception, namely, if the company purchases them on commission. The question, however, as to when shares were purchased " in the ordinary course of its business " was answered in different terms by legal experts.

In the reform movement these provisions did not play any important rôle and were not much discussed. The problem became very acute when in 1930 and 1931 various companies, led by the *Deutsche Bank und Disconto Gesellschaft* and the *J. G. Farbenindustrie A.G.* purchased large amounts of their own shares. This proceeding was not merely prompted by a desire to fix the price; by buying shares which had fallen below par the companies intended to make a profit in their accounts with which they would compensate losses. The dangers of such proceedings soon became evident. The purchase of its own shares by a company was in a certain sense considered as a reduction of its capital, by which shareholders as well as creditors were injured. The Government therefore decided that new and speedy regulation of this matter was necessary. It, therefore, prohibited on principle the purchase of a company's own shares by a subsidiary company. And the acceptance of a mortgage on purchase by some other person or company on the account of the company or the granting of a guarantee is considered as unlawful. In contradiction to the recent decisions of the Supreme Court this prohibition also must be taken to include the subscription for shares of a controlling company by its subsidiary companies.

There are only three exceptions made; the company may purchase its own shares: (1) to prevent a severe loss by the company; (2) if the company purchases its shares on commission; (3) if they are purchased to be cancelled. But only if the total amount of its own shares in the hand of the company—including those it already possesses—does not exceed 10 per cent. of the stock capital and on condition that the shares are cancelled not later than six months after the purchase.

The right of vote on shares purchased is suspended, as also the claim to the net profit and the claim to exercise and participation in the proceeds of the winding up. The annual report must contain full information as to the purchase of a company's own shares. The value put down in the balance sheet must not—according to s. 261 c.2—exceed the price paid. If, however, the value of such shares has decreased before the date when the balance sheet is drawn up, they must not appear with the higher value in the balance sheet.

The question as to the legal consequences if default is made in complying with this provision is much controverted. Since the opinion of the experts varies so much, further legislative provision will be requisite. If any damage occurs to the company by default in complying with the law, the management is liable.

In England also certain objections have been raised against the purchase of their own shares, especially against the practice of some companies of paying a sum by way of commission in respect of their own shares or debentures. It is now provided that it shall not be lawful for a company to give, whether directly or indirectly and whether by means of a loan, guarantee or otherwise, any financial assistance for the purpose of a purchase by any person of any shares in the company (Companies Act, 1929, s. 45).

**Reduction of Share Capital in a Facilitated Form.**—The emergency measures in Germany contain several provisions facilitating reduction of a company's share capital. These provisions enable companies to adjust their capital to the changed economic situation resulting from the steadily decreasing value of their securities and of other assets or from the shrinking of their business. Such reduction may be attained by three different ways: by cancellation, by reduction of the nominal value of the shares and finally by combining shares of larger nominal value into smaller units. If the reduction takes place by means of one of the three ways described above it is not necessary to comply with the special provisions for the protection of the creditor. This emergency regulation, which is very popular, has been extended in duration.

**Provisions as to Offences.**—The Draft Act of the *Reichsjustizministerium* declared that there would be no aggravation of the punishments for criminal offences, since such measures were to be left to the reform of the general criminal law. In spite of this declaration, however, the emergency measures contain a severe aggravation of punishments, especially in relation to breach of trust and falsification of the balance sheet. The legislator thought this step necessary because of recent events. In case of grave criminal offences, offenders may now be sentenced to imprisonment not exceeding five years. Moreover, incorrect reports by auditors, lack of discretion and illegal utilization of business secrets and illegal use of knowledge by an auditing company, are considered as offences.

The English law also contains general provisions as to offences but does not deal with the matter very fully. The sentences, however, following the proceedings against the City Equitable Fire Insurance Company, Hatry and Lord Kylsant show that the old law contains sufficient provisions, though the English law on principle is opposed to severe sentences.

**Holding Companies.**[1]—Owing to important economic changes resulting from the concentration of business the English as well as the German legislator has felt obliged to deal with certain legal difficulties which had arisen.

The steadily growing power of the administration and the steadily decreasing power of the general meeting had led to a diminution of publicity. The complicated forms of combination made the balance sheet and the profit and loss account increasingly unintelligible. The underlying principle of the new law in regard to holding companies is exactly the same as that which is at the basis of the reform movement regarding the whole of companies' law. The power of the administration is to be restricted in favour of the power of the general meeting, publicity is to be increased and the measures of control intensified.

The Greene Commission carefully examined the question of holding companies. The report emphasizes that there was a considerable divergence of views among the experts on the subject as to how the problems were to be legally dealt with. Complaints were made by shareholders that the information which the books of holding companies disclosed was quite unintelligible without fuller details as to the position of companies connected with it. Several experts therefore took the view that the publication of a consolidated and combined balance sheet for the whole group of companies should be made compulsory. The Commission did not agree with this point of view. It took the view that it should be left to the shareholders of such companies to determine the form of their company's account. It is often overlooked that it may be in the interests of the shareholders that the accounts should be in a special form. The Commission strongly urges the legislature to refrain from undue interference in the internal affairs of the companies even at the risk of hardship in special cases.

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[1] Further information is contained in: Rosendorff, *Das neue deutsche Aktienrecht*, II. Ed. (Industrieverlag Späth & Linde, Berlin-Wien, 1932) and a pamphlet by the same author: *Konzerndämmerung* (Orell-Füssli, Zürich-Leipzig, 1932).

This point of view explains why the English Companies Act contains only a few provisions (ss. 125–6) which exclusively deal with the balance sheet and the profit and loss account in the case of subsidiary companies.

A definition of " subsidiary company " is provided by s. 127, which states that a company is to be deemed a subsidiary company if its shares or voting power are, up to 50 per cent., held by another company or another company has power to appoint the majority of its directors.

The German legislator—though dealing more fully with this matter than the English—only regulated certain questions. He did not create a body of law for holding companies. In this matter we need to differentiate between the part of the Draft which is left to the ordinary legislative procedure and those provisions which in the autumn of 1931 became valid law.

The German Draft, though dealing with the *Interessengemeinschaftsvertrag* by which mutual participation of profits is established, does not regulate the legal side of this contract, but provides only that to make the contract effective the approval of the general meeting of both capital companies is required. A contract by which a company leaves the operation of its enterprise to another company or by which it agrees to operate the enterprise on the account of another company also requires such approval. According to the older law such contracts had been signed by the administrators of the company without consulting the general meeting. The German legislator limits this power. He has done so by way of an explicit legal provision since the courts considered contracts not based on the consent of the general meeting as allowable. The only exceptions made were such contracts as that between the Rumanian Government and the Royal Railway Company, which by a decision of the Supreme Court of February 19, 1881, was declared invalid, on the ground that the statutes gave too great a power to the administration, thus neglecting the just interests of the general meeting; or such a contract as that between the *Deutsche Petroleum Verkaufsgesellschaft* and the *Deutsch Amerikanische Petroleum Gesellschaft*, which belong to the Standard Oil Company. This contract also was by the Supreme Court (May 27, 1913) declared void, and even immoral, since the partner was entitled completely to direct the operations of the other company and since the organs of the subsidiary company were so dependent upon third persons that the company became a mere instrument of the other party. By the new provisions the power of those who manage and govern the policy of the company is restricted. In the future they are not to be entitled to make, dissolve or materially change any interest or agreement without the consent of the majority of the general meeting representing at least three-quarters of the stock capital present at the time of the resolution. It may be that in case these provisions become effective law the development of the concentration movement will follow more frequently than previously the form of participating in another company by taking over a large portion of its shares, since for this case the legislator does not provide any restrictions.

The Draft, though following the advice of the radical friends of reform and not abolishing the plural vote shares which play an important rôle in company law, greatly restricts their power.

The Draft differentiates between: (1) holding companies, (2) dependent and controlling companies, (3) dependent undertakings.

The Draft does not define a holding company. The conception will have to be formed by considering the legal facts resulting from economic concentration. The following factors may, according to the definition of the Supreme Court, be taken as essential: (1) centralization of management; (2) the fact that different parts of the total enterprise can no longer be understood as individual self-existing units; (3) the connexion between the holding company and the subsidiary company in relation to the total economic life.

A holding company can be built up according to two different schemes: horizontally, formed by co-ordinated companies, or vertically, by subordinated companies, especially by subsidiary companies.

I shall later show how the legal regulation differs according to whether it has to deal with a co-ordinated company or with the relation between subordinated companies.

Though the Draft does not contain a definition of a holding company, it does define "controlling and dependent company." The controlling company is a company which controls a joint-stock company or a mining company by its participation or in any other way. This control makes its partner a dependent company.

The controlling influence may result from contracts like interest-agreements and exchange of the companies' officials. The provisions regarding publicity of the annual return, the balance sheet and the profit and loss account, and those in regard to the supervisory council, apply both to holding and dependent companies. The annual return reports upon the relation of the dependent companies to the holding companies, also as to shares of which the holders are by special agreement in favour of the company restricted in their right to vote, their right to get dividends and in the power to dispose of their shares. The consortial contracts must be disclosed, as also the amount of shares of a company held by the company itself or through a nominee on its account. The report may be dispensed with only so far as may be required by interest of the company or the public.

The supervisory council is entitled to receive full information concerning the company's relation to syndicates, cartels, pools or similar organizations.

Special provisions tend to eliminate the danger that a dependent company may be used by the controlling company to its disadvantage.

A dependent company must not subscribe for shares of the controlling company. This regulation finally decides an old controversy, which on different occasions had been resolved by the Supreme Court in different ways. On January 18, 1924, the Supreme Court in a case of damage against the *Kaliwerke Neustassfurt* decided that the capital increase of the joint-stock company *Kaliwerke Neustassfurt* was invalid since the shares of the mining companies *Neustassfurt I* and *Neustassfurt II* were held almost entirely by the before-mentioned *Kaliwerke* and these companies had taken over the new shares. According to the judgment of the Supreme Court an increase of capital had only nominally taken place without any material change of the financial position. A true increase of capital involves the addition of new assets to the company's capital. But in this case no assets were added since the two companies represented a unit. The Supreme Court, however, did not maintain the same position in its decision of November 9, 1926.

For the same reasons a subsidiary company is allowed to acquire or take on mortgage shares of the controlling company only in so far as it complies with the provisions regulating the acquisition of the company's own shares by the company itself. The subsidiary company when acquiring the controlling company's shares is considered as a unit with the controlling company. The restrictions put upon a company in relation to the acquisition of its own shares are also valid for subsidiary companies. Shares of the controlling company may therefore be acquired by the subsidiary company only to avoid severe injury to the controlling company. In this case the amount of shares acquired must not exceed 10 per cent. of the stock capital. If a total of 10 per cent. is already acquired the acquisition of further shares is only allowed if the company intends to cancel them.

The new law does not contain any definite rules for holding companies so far as the audit is concerned. The Government is, however, entitled to make a special regulation in case it provides for an amalgamated and consolidated balance sheet for holding companies. A provision already exists which prohibits an auditor over whom the audited company exerts a great influence from being appointed auditor of the company. This is a provision which is of great importance for the banks as auditing organizations since it excludes them in many cases from functioning as auditors.

There are no restrictions upon the common practice of one person being a member of the Board of Directors as well as of the supervisory council of the holding company and also of the subsidiary company, though this practice often results in conflicting interests. Some influence will be exercised upon the selection of the members of the supervisory council of holding companies by the new law, which restricts the number of the members of the supervisory council to thirty and which provides that one man is not allowed to concentrate more than twenty offices in a supervisory council in his hand.

In considering the significance of international economic concentration the question arises as to whether and how far the German provisions also apply to foreign companies. The question as to whether or not the provisions regarding holding companies shall also apply to foreign corporations is of special importance for foreign holding companies which possess subsidiary companies in Germany. Those provisions which relate to the disclosure of facts in regard to economic concentration apply as well to the relationship between a company established in Germany and a foreign holding company. Their balance sheet has to disclose any rights or liabilities towards foreign subsidiary or holding companies.

The right of the Government to provide special regulations for the drawing up of a consolidated balance sheet extends also to the annual return of foreign holding companies.

The problem of the acquisition of the company's own shares by the company itself and that concerning the question of loans to members of the Board of Directors or the Board of Control present greater difficulties.

The following problems arise: (1) Does the restriction concerning the acquisition of the company's shares by the company itself also apply to the acquisition of shares of the controlling company by a foreign subsidiary company?

The answer will have to be in the negative, since the legislator cannot prohibit the action of a foreign company and since he cannot impose any duty to pay damages upon the members of the Board of Directors of a foreign company for proceedings which in their own country are legal. In so far, however, as the controlling German company takes part in the acquisition of its shares by the foreign subsidiary company, particularly if it accepted the subscription of the subsidiary company, the German company may be held responsible. This case falls under s. 30 of the *Einführungsgesetz* of the German Commercial Code by which the application of a foreign law is excluded where it would contradict the purpose of the German law, *e.g.* would not be in compliance with s. 226 of the Commercial Code.

(2) Another question arises in regard to loans from a dependent company applied for by the members of the Board of Directors of a controlling company.

This problem is not yet settled. Lehmann-Hirsch for example takes the view that only German commercial companies can be considered as "subsidiary companies" since the term *Handelsgesellschaft* to which the law refers is a *terminus technicus* used only by the German law. In my *Kommentar zur Aktienrechtsnovelle* I explain fully why I cannot agree with this argument. In my opinion the provisions regulating the granting of loans must also apply to foreign companies since the regulation is concerned with the supervisory council of the German company. The regulation is an important part of the general reform of the administration of companies.

# NOTES ON IMPERIAL CONSTITUTIONAL LAW.

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**The Union of South Africa and Foreign Affairs.**—As was natural, it has not taken the Union Government long to follow the example of the Irish Free State and to decide to dispense even with formal British intervention in the conclusion of treaties. As in the Free State,[1] the action for this end takes the form of the striking of a new seal which will replace the Great Seal of the Realm on those documents affecting foreign affairs which are issued by the King for the purpose of the signature and ratification of treaties. No warrant countersigned by a Secretary of State will thereafter be necessary for the conclusion of conventions, and the Union will thus emphasize her status as a sovereign state, whose ministers are in direct contact with the King. An interesting incident illustrating the new policy of direct relations, first established as normal by the Irish Free State, was recorded at the opening of South Africa House on June 22, 1933, by the King. General Smuts, as Deputy Prime Minister of the Union, was in attendance on His Majesty, and received from him the address of welcome presented by Mr. C. te Water,[2] the High Commissioner, and handed to the King his address in reply. It is significant that Mr. MacDonald, Mr. Baldwin and Sir John Simon were all present, but merely as spectators.

**The Treatment of Commonwealth Visiting Forces.**—The passing of the Statute of Westminster has necessitated changes in the Army and Air Force Acts in order to meet the rule that, without Dominion consent duly recited in the Act, no Imperial Act may bind any Dominion to which the Statute has become applicable. In the case of the Commonwealth, New Zealand and Newfoundland, the Statute has not been brought so far into operation, and the Army and Air Force Acts duly recognize this position. As regards the other Dominions, provision has now been made by the Union of South Africa[3] to secure that any visiting British force shall be legally under control by the service courts of the force authorized by British legislation, and that the service authorities shall receive due aid from the local administration. The Imperial Parliament has likewise legislated in the Visiting Forces (British Commonwealth)

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[1] Keith, *Const. Law of the British Dominions*, pp. 51–4.

[2] For information on Union action I am indebted to the courtesy of Mr. te Water.

[3] Defence Act (Amendment) and Dominion Forces Act, 1932 (No. 32), ss. 6–11.

Act, 1933. Some criticism was voiced in Parliament as to the dangers of a measure which limited the possibility of application for a *habeas corpus* in respect of a Dominion soldier or sailor detained under authority of a service court of a visiting force, but this was not pressed very seriously. It must be remembered that the Act gives a measure of security against detention of a non-member of such a force under feigned authority, for a certificate by a commanding officer is conclusive evidence of the cause of detention, but not of the person concerned being a member of the force. It is perhaps a more serious objection that the courts have no power to interfere with service courts even if they exceed their jurisdiction, but this is a most obscure branch of law,[1] and there are certainly strong grounds of comity upon which to rule that it is best to give unfettered power over members of Dominion forces to their own courts. There is, however, in this case a good illustration of the difficulties caused to the House of Commons by measures agreed on with Dominion governments. It becomes almost impossible to amend such Bills, and thus in one more point, and that an important one, the executive gains an advantage over the legislature, and thus tends to lessen the importance of the latter both in its own estimation and that of the public.

**The United Kingdom as a Dominion.**—The Union Act is interesting because it formally[2] includes the United Kingdom under the definition of Dominions. Fortunately for those who are not enamoured of that term—which after all was forced upon Sir John Macdonald—the Union Act leaves intact the statutory declaration under Henry VIII,[3] often echoed in subsequent statutes, that England—now the United Kingdom—is an Empire. The issue of the nomenclature appropriate to the changed conditions of the times forms the subject of the last important contribution of the late Mr. Ewart[4] to the literature on Dominion status, but his natural revival of Sir John Macdonald's suggestion of the style of Kingdom might not be welcome in the Union, and certainly not in the Irish Free State. Mr. Ewart deals also effectively with the uncertainty of the meaning of the term British Commonwealth of Nations. In point of fact, after some uncertainty due to the famous definition attempted in the Report of the Imperial Conference of 1926, the British Government has adopted a use which makes the Commonwealth cover the whole of the Empire, regarded as a galaxy of equal units or, as the Union Act of 1932 has it, " State-Members " with their dependencies. In the Ottawa Agreement discussions the terms Empire and Commonwealth appear as synonyms ; the treaties with foreign Powers since concluded safeguard the Commonwealth, clearly including all British dependencies ; and the legislation as to visiting forces[5] is made applicable to the colonies and other territories dependent on the United Kingdom. This practice seems to have everything to commend it ; to exclude India or Ceylon from the connotation of the Commonwealth would clearly be unfortunate.

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[1] The *locus classicus* is the late Mr. Justice McCardie's judgment in *Heddon* v. *Evans*, (1919) 35 T.L.R. 642.

[2] Act No. 32 of 1932, s. 6.

[3] 24 Hen. VIII. c. 12 ; cf. 26 Hen. VIII. c. 1 ; 1 Eliz. c. 1 ; 13 Eliz. c. 1 ; Bacon, *Works*, vi, 270.

[4] *Can. Hist. Review*, xiv, 123–35.

[5] 23 Geo. V. c. 5, ss. 5, 6 ; Union Act, No. 32 of 1932, s. 11.

**Diplomatic Immunities in the Dominions.**—The Union Diplomatic Immunities Act, 1932, is a natural outcome of the presence in the Union of foreign diplomats. In countries where English is the common law, it might have been satisfactory to allow their position to be regulated by that law, but doubtless there are advantages in defining what privileges are in fact to be recognized. The Union is careful to limit the immunity, for it does not apply to any agent in connexion with any transaction entered into by him in the exercise of any trade, profession or calling in the Union, other than the calling of a diplomatic agent.[1] This is a good deal less generous than the British rule, which is believed by British judges to accord with international law, but which probably goes beyond the real requirements of that law. The immunity from civil or criminal jurisdiction extends to the agent's family ; his diplomatic staff, which includes stenographers, typists, porters and chaplains, if employed exclusively for the purposes of a legation, and their families ; and his servants if aliens, but presumably not their families. It is possible that this immunity in matters criminal is rather too wide ; there is a discreet vagueness about English law on the topic which leaves it possible for serious crime by a member of the family of a diplomat to be dealt with.[2] Nor is it clear that any real diplomatic gain accrues from the right of members of a diplomat's family to ride or drive carelessly without liability to penalty or suit for damages. Provision is made (s. 4) for registration at the agent's request of the members of his suite, and violation of their privileges is made (s. 10) criminal, as is also the action of any person who as plaintiff, attorney or officer sues out, obtains or prosecutes any legal process in contravention of the Act if he does so wilfully or without reasonable care. As in England, questions of exemption are to be determined by official declaration, made in this case by the Secretary of the External Affairs Department. The Act proceeds cautiously as regards exemptions, conceding freedom from income-tax, rates, and taxes on moveables, and free entry of goods for personal use only on the basis of reciprocity (s. 6). There remains, of course, much that must be left to be worked out in practice by the courts. But certainly it is desirable that diplomatic agents should not be encouraged to enter into business or professional work in the countries to which they are accredited.

**Nationality of Former Burghers.**—The Union has solved by legislation a problem of obscurity on which definite authority has been lacking. The burghers of the conquered republics who remained in the territories clearly became British subjects under the principles of English law, but what of those who left the territory in which they had been citizens ? Those who never returned could not reasonably be deemed British subjects, but, if after a period of absence return took place, did that give British nationality? The Act provides explicitly that any national immediately preceding annexation of either republic, who has not become a national of any other State, shall be deemed to have become a British subject if he became resident in any part of the Union—not merely the territory of the former republic—after the date of annexation and before the date of commencement of the Union Nationality and Flags Act, 1927, while entry after that date confers Union nationality. It is an interesting problem how far such nationality is sufficient to give the status of British subject outside the Union. The question, failing legislation, will have to be answered if it ever becomes necessary on the basis of the existing and very obscure law.[1] The Act, with an interesting admixture of subjects, includes an amnesty for those who still suffer from disabilities by reason of offences committed in connexion with the Witwatersrand disturbances of 1922.

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[1] Diplomatic Immunities Act, 1932 (No. 9), s. 1.

[2] Wheaton, *International Law* (ed. Keith), i, 460 f.

**Treaties and the Law of the Land.**—The doctrine recently asserted in Canada[2] that treaties not followed or preceded by legislation cannot alter property rights is reiterated and apparently was not seriously denied in the English case of *Administrator of German Property* v. *Knoop*.[3] The agreement in question, that between the United Kingdom and Germany of December 28, 1929, was given effect in Germany by legislation, but no such step was taken in the United Kingdom, and Maugham J. had no difficulty in accepting the Attorney-General's contention that it could not be relied upon in English law as justifying a property claim. The case also applies to Germany the doctrine recently asserted for the British Crown in *Civilian War Claimants' Association, Ltd.* v. *The King*[4] that in a treaty the sovereign power cannot normally be assumed to be contracting as agent for its nationals.

**The Crown and Naval and Military Officers.**—The case of *Kynaston* v. *Attorney-General*[5] affords one more instance of the rigidity of the rule that no engagement between the Crown and any of its military or naval officers can be enforced in a court of law. Whatever the merits of Col. Kynaston's case, Mr. Justice Farwell insisted, it was clear law that it could not succeed. The same result was achieved in the Court of Appeal, but the judgment of that Court is of special value as regards the suggestion that a declaration could be sought as to rights in a suit against the Attorney-General, a position naturally denied by the latter. The Master of the Rolls pointed out that the famous case of *Dyson* v. *Attorney-General*[6] was concerned with a completely different subject-matter, the construction of an Act of Parliament involving the rights of His Majesty's subjects, while the issue in question in Col. Kynaston's case was that of alleged wrongful retention in the service after liability had expired.

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[1] Keith, *State Succession in International Law*, pp. 42 ff.

[2] *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, p. 271.

[3] 49 T.L.R. 109.

[4] [1932] A.C. 14.

[5] 49 T.L.R. 114; (C.A.) 300.

[6] [1911] 1 K.B. 410.

Moreover, such detention must, if unjustified, be a tort, and the Crown could do no wrong; redress could only be obtained from the person responsible whether in or out of the service of the Crown; that person was not the Attorney-General, and the action therefore must fail. Legally, no doubt, the result is unimpeachable, but the question inevitably remains whether it is wholly satisfactory to leave such issues as those brought forward by Col. Kynaston to be decided without appeal by the Army Council, at any rate when the question is essentially one of pecuniary importance.

**The Liability of the Crown in Contract.**—A very interesting contrast with the state of affairs where military or naval, or indeed civil, officers are concerned, is afforded by the decision of the merits of the long-disputed contest between the Dominion Building Corporation and the Canadian Government. Students of relations between the subject and governmental authorities may justly insist that there is difficulty in securing rapid settlement of such questions. The Canadian Government long disputed the right of the claimant body to have a judicial decision on the issue at all. It asserted that no proper reference to the jurisdiction of the Exchequer Court had been made, and this view was accepted on appeal from that Court by the Supreme Court of Canada, but overruled by the Privy Council.[1] Thereafter the Exchequer Court awarded damages on the merits of the case, but that judgment was reversed by the Supreme Court, now to be reversed by the Privy Council.[2] The issue which has so troubled the courts seemed at first simple; the corporation offered in 1925 to purchase some land in the hands of the Dominion Government; the offer was mentioned in an Order in Council approved by the Governor-General authorizing a sale in terms of the offer, and a certified copy was sent to the offeror, who asked later for extension of the time of completion. This was granted, but, when he eventually offered to complete, the offer was refused on the score of delay. The matter, however, was complicated by the fact that under s. 15 of the Department of Railways and Canal Act[3] any contract in a matter under the charge of the Minister had to be signed in a specified manner, and no such contract existed. The Privy Council met this technical point by stressing the fact that the section did not apply to contracts not in writing, and that the place of a contract was suitably taken by the Order in Council, the passing of which, even apart from communication to the offeror, by the terms of the offer must be deemed to have completed an agreement for sale. More difficult was the question of time, and, arising out of a complex argument, their Lordships arrived at two results of general importance. They held that, while normally an order for specific performance could not be made against the Crown, yet the terms of the Canadian Petition of Right Act[4] were apt to permit the court in a proper case to make a declaration as to the right of the subject to specific per-

[1] [1930] A.C. 90.

[2] 49 T.L.R. 516.

[3] R.S.C. 1906, s. 35.

[4] R.S.C. 1906, c. 142, s. 8.

formance if the circumstances so demanded, and they held that the savings of the rights of the Crown in the Ontario Interpretation Act [1] applied only to accrued rights and not to mere possibilities, such as rights which might have accrued under future contracts but for an alteration made in the general law. By means of these doctrines, whose implications are important, the Privy Council was able to hold that time was not of the essence of the contract and that the appellant was entitled to have the judgment of the Exchequer Court restored.

**The Provinces and Indirect Taxation.**—While the Privy Council has been compelled by the terms of s. 92 of the Commonwealth Constitution to oppose constitutional difficulties in the way of the effective operation of the South Australian scheme for the orderly marketing of dried fruits,[2] the British Columbian effort [3] to bring about prosperity in the milk trade has foundered, so far as law is concerned, on the fact that the provinces are confined to direct taxation. The scheme, which was attacked, and which has been held invalid by the courts of British Columbia as well as by the Judicial Committee, worked on the usual basis of imposing an adjustment levy on producers of milk, so as to secure that those who were able to sell it as fluid milk should not profit unduly as compared with those who had to manufacture products from it. Such a scheme, of course, is the most effective way of preventing the result of ruinous competition among producers of milk, and the plan has recently won acceptance from the British Government. But the issue was inevitably raised in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*,[4] whether, whatever the merits of the scheme, it did not inevitably involve the imposition of an indirect tax. It is not surprising that on the authorities the courts had no option but to hold that it did. The levies were imposed by a public body, one member of which was appointed by the Government ; they were enforceable by law and a farmer who disobeyed a determination by the committee could be fined ; as compulsory, therefore, they were in the nature of taxes as laid down in *City of Halifax* v. *Nova Scotia Car Works*.[5] That they were indirect [6] followed inevitably from the obvious fact that the firms which had to lay the levies would necessarily tend to pass on the burden to the consumers, and in doing so they would be aided by the limitation of competition among sellers of fluid milk which formed an essential part of the scheme in question. The same consideration applied to the levies for expenses which the legislation of the province also authorized, so that the legislation, being essentially bound up with the imposition of indirect and therefore invalid taxes, must fall to the ground. The fact that the proceeds of the levies were not retained by the province, but were made over to producers of manufactured products, was naturally held to be invalid in any consideration of the question of the nature of the taxes. Inevitable as the judgment is, it is one more proof of the fact that the Dominion Constitution, produced in a period when State regulation of production was not thought of, is inadequate for the needs of the present day.

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[1] R.S. Ont. 1927, c. 1, s. 10.

[2] See *Journ. Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 269–71.

[3] Dairy Products Sales Adjustment Act, 1929 (c. 20), amended by 1930 (c. 13) and 1931 (c. 14).

[4] [1933] A.C. 168.

[5] [1914] A.C. 992, 998.

[6] Contrast *Workmen's Compensation Board* v. *C.P.R. Co.*, [1920] A.C. 184.

**Dominion Courts, the Privy Council and the House of Lords.**—Difficult issues have recently had to be faced by Canadian courts as regards the course to be followed when judicial ingenuity is unable to distinguish questions coming before the courts from questions earlier decided in different senses by the Privy Council and the House of Lords. There are, of course, but few cases when such divergence has occurred, but they touch points of practical importance. The difference of opinion as to negligence in connexion with negotiable instruments which was seen in the refusal of the House of Lords in *London Joint Stock Bank* v. *Macmillan* [1] to follow the view of the Privy Council in *Colonial Bank of Australasia* v. *Marshall* [2] came before the Court of Alberta in *Will* v. *Bank of Montreal*,[3] and with hesitation it accepted as binding the view of the House of Lords. Similarly, but in a much stronger manner, in Ontario the Court of Appeal has ruled, in *Negro* v. *Pietro's Bread Co., Ltd.*,[4] that on the question of the right to recover damages for mental shock without substantial physical injury it should be guided by the views expressed as to English law by the Court of Appeal in England and the Irish court, and not by the much-discussed judgment of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*.[5] The Alberta decision can, of course, be defended on several grounds ; the issue is one of common law, and on that the House of Lords has been expressly declared by the Privy Council itself [6] to be the highest authority binding on Dominion courts, so that it may be argued that the Privy Council itself has laid down that a House of Lords decision—at any rate subsequent to a decision of the Privy Council—on a question of common law is to be followed in preference to an earlier decision of its own. Further, the Privy Council is able to reconsider its decisions, and presumably in view of its own doctrine would do so in such a case, whence it is fair to argue that the court below should save expense to litigants by acting as the Privy Council would act if the matter finally reached it. On the other hand, the action of the Court of Appeal of Ontario does not rest on any actual decision of the House of Lords, though doubtless it is in harmony with the weight of opinion in English law,[7] and, in view of the fact that the issue had been actually decided in the Victorian case by the Privy Council, it may seem open to doubt if the Ontario court should not rather have followed the Privy Council, leaving it to the Privy Council to set itself right if it thought fit, or have distinguished the case on the ground that some slight injury had taken place. In other cases in Canadian courts [1] the view has been expressed on this issue that the Privy Council judgment must be followed so long as it stands, and it is possible that the new interpretation of the duty of the court may have been induced by the facts of the case. But the difficulty of conflicting judgments on what is supposed to be one and the same common law is further illustrated by the attitude of the Court of Appeal [2] to the Privy Council on the subject of common employment as a defence in certain circumstances, and strengthens the view that it is unfortunate that the Empire has two final Courts of Appeal.[3]

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[1] [1918] A.C. 777.

[2] [1906] A.C. 568.

[3] [1931] 3 D.L.R. 526.

[4] [1933] 1 D.L.R. 490.

[5] 13 App. Cas. 222.

[6] *Robins* v. *National Trust Co., Ltd.*, [1927] A.C. 515.

[7] *Bell* v. *Great Northern Railway Co. of Ireland*, 26 L.R.Ir. 428, *per* Palles, C.B.

**The Legislative Council of New South Wales.**—By a rather slender majority the electorate in New South Wales has approved the Bill duly submitted to a referendum for the reform of the second chamber. It was clear that, when the nominee upper house had been increased in numbers to 121 as opposed to a lower house of 90 members, reform was urgent, and the scheme adopted rests on election by the two houses, not sitting together, on the system of proportional representation, excluding members of the Assembly from eligibility. The number of members fixed is 60, the duration of office twelve years, while the necessary change in membership is secured by having the first election by four stages, at each of which fifteen members are chosen, to hold office for twelve, nine, six and three years respectively. This, of course, has clear advantages over the cruder system of ballot to decide retirement. Naturally the mode of election has not passed unchallenged; it has been argued by its opponents that, having regard to the political complexion of the membership of the houses, the Government secures itself inevitably a favourable majority in the upper house to begin with, and an advantageous position for future elections. On the other hand, no alternative scheme of recruitment had any strong backing, for there seems to be little inclination to create an elected upper house depending directly on the people, and thus apt to insist on its rights as against the Assembly. For deadlocks the provision is made that, if a Bill be twice rejected or unacceptably amended by the Council, the Governor may convene a joint session of the houses to discuss the Bill but not to vote upon it. Thereafter the Assembly may resolve that the measure be submitted to a referendum either during the lifetime of the existing Parliament or contemporaneously with the next general election; if then approved by the electorate, it can be assented to without the agreement of the Council. In the case of Bills appropriating revenue or moneys for the ordinary annual services of the Government, the Assembly is given conclusive powers; the Council may suggest amendments within a month; if the Assembly then wishes to accept them it can, or it can reject them, and present the Bill for assent over the head of the Council. But any provision in an Act thus assented to which deals with any matter other than such appropriation shall be of no effect. This is an interesting clause, and seems to be as well safeguarded as is possible,[1] but it must offer some difficulty of interpretation, and still more of enforcement, so that it would have been desirable if some procedure could have been devised under which the Speaker of the Assembly with the aid of a committee could have given a certificate binding on the courts. But in all probability such a clause should serve as a constitutional principle, warning governments not to include in appropriation Bills any but usual clauses, a doctrine which now has wide authority in Australia.

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[1] *Henderson* v. *Canada Atlantic Railway Co.*, 25 O.A.R. 437; *Toronto Railway Co.* v. *Toms*, 44 S.C.R. 268; *Penman* v. *Winnipeg Electric Railway Co.*, [1925] 1 D.L.R. 497.

[2] *Fanton* v. *Denville*, [1932] 2 K.B. 309, referring to *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734.

[3] In *Lobb* v. *Rockwood Rural Credits Society*, [1926] 2 D.L.R. 819, it is suggested that a Canadian court is bound by a Privy Council judgment, but not by a dictum, if there is a House of Lords judgment to the contrary.

**The Irish Free State Constitution.**—By the passing into law, over the head of the Senate, of the Constitution (Removal of Oath) Act, 1933, much more is accomplished than the mere deletion of an oath which was regarded with satisfaction by no section of the Dáil. The Act deletes from the Constitution the limitation that constitutional change must be within the limits of the treaty, and thus claims for the Free State the same paramount power of change which is enjoyed by the Union of South Africa under the Statute of Westminster, 1931. It is, of course, anomalous that a legislature which is created with limited powers by the Constitution should override these limitations, and in strict law it is doubtless impossible to find any warrant for the validity of such an enactment. But that its validity will be questioned with success in the Irish courts may be assumed as beyond possibility, and another successful step to complete sovereignty has obviously been taken. The Constitution now becomes absolutely flexible, and incidentally it must now be assumed that none of the securities for the rights of the subject therein contained has any constitutional value. If a subsequent Act overrides them by implication, it clearly will have to be allowed validity by the courts. It was in fact not to be expected that the Irish Free State would remain contented with any restrictions on its constituent power such as those held desirable by the Constituent Assembly of 1922, in view of the influence on Irish opinion of the unrestricted powers of the Imperial Parliament.

**British Courts and Dominion Legislation.**—An interesting question naturally is suggested by the Irish legislation. Could a British court hold that an Irish Act which violated the Constitution was invalid, and refuse to recognize rights conferred thereby, when by any reason these rights fell to be pronounced upon by an English or Scottish court? The answer is probably in the negative, as is suggested by the result attained in *Boardman* v. *Grand Trunk Railway of Canada.*[1] The issue there involved *inter alia* the right of the English court to pronounce on the validity of Canadian statutes and Orders in Council affecting the transfer rights of the Railway Company to the Crown. The claim was put on the ground that the plaintiff was an Englishman, that the wrong done to him was done partly or wholly in England, and that the action was brought in respect of his rights in the English shares of a company whose head office was in England. It was insisted that the powers of the Canadian legislature were not extraterritorial so as to be able to deprive an English subject of rights in England. For the defendant it was pointed out that the matter turned on the validity of Dominion statutes, which should be decided in Canadian courts subject to appeal to the Privy Council, that in Canada only could an issue affecting the rights of the Dominion [2] in property suitable be decided, and that English courts would not enforce a claim where such enforcement involved interference with the authority of a foreign State within the limits of its territory.[3] It is significant that Luxmoore J. held that the statement of claim did not disclose any cause of action which was maintainable in his court, and that he did not dispose of the case, as was possible, by accepting the argument that, whether maintainable or not, the case was one properly to be litigated in Canada, if for no other reason than the expense involved in English proceedings. The judgment is in no way inconsistent with the fact that English courts have taken judicial notice of the fact that colonial legislation is normally limited to territorial application.[4]

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[1] It is an interpretation clause, binding unless overridden (cf. *Silver Bros., Ltd., In re*, [1932] A.C. 514), and cannot be altered except by a Bill approved by referendum.

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[1] 49 T.L.R. 218.

[2] *A.-G.* v. *Great Southern and Western Railway Co. of Ireland*, [1925] A.C. 754, at p. 779.

[3] Dicey and Keith, *Conflict of Laws* (ed. 5), p. 25.

[4] *Low* v. *Routledge*, (1865) 1 Ch. App. 42; on appeal (1868) L.R. 3 H.L. 100; *London and South American Investment Trust* v. *British Tobacco Co.* (*Australia*), [1927] 1 Ch. 107.

# NOTES.

**The Chairman of the Society.**—For five years the affairs of the Society have been guided by Lord Atkin, whose interest in legal education and the study of the law are well known even to many beyond the legal circle. The Society has indeed been fortunate in having a Chairman who so happily combined a profound knowledge of legal principles with a wide experience in dealing with other systems besides that of the law of England. With keen appreciation of his valuable services the Committee felt obliged to bow to his desire to resign in order to conserve his strength for numerous other activities which were making too heavy demands upon it. Moreover, Lord Atkin was able at the same time to suggest as successor Lord Macmillan. The Committee believed that provided the members of the Society recognized the soundness of their decision in accepting Lord Atkin's resignation there was no one whom they would more readily welcome as their Chairman. On behalf of the Society they have placed on record their gratitude for the assistance which Lord Atkin has given to its work and their appreciation of the fact that he will still remain a member of the Committee. To the new Chairman they are confident that the members will give a cordial welcome and trust that they will show it by extending the scope of the Society's activities.

**The Centenary of the Judicial Committee.**—An article by Lord Macmillan in *The Times* of August 14 appropriately marked the centenary of the enactment of the "Act for the better Administration of Justice in His Majesty's Privy Council" (3 & 4 Will. IV, c. 41) whereby the present Judicial Committee was given a statutory basis. This development of a law court out of an executive body is, of course, far from unique in British legal history. Stranger things still have happened, to the confutation of all good political logicians with their well-arranged schemes for separation of powers.

There is an imposing and oriental simplicity in the theory upon which the Judicial Committee is built which kindles the imagination. We see the mighty King-Emperor to whose feet all the subjects of his far-flung Empire may bring their petitions for redress of grievances, and a body of the most eminent and learned of his realm to whose consideration the petitions are referred that royal justice may be done to all.

But how will this Imperial Court of Justice fit in with schemes of appellate jurisdiction which are now being mooted, and very properly mooted?

At the recent provincial meetings of the Law Society at Oxford, Sir Reginald Poole, in his presidential address, is reported to have expressed the view that no reform of English procedure was more pressing than the limitation of appeals. Few will be inclined to differ. The scheme proposed by Sir Reginald appears to involve the abolition of the appellate jurisdiction of the House of Lords and the constitution of a new final Court of Appeal for England and Wales, consisting of twelve members made up of the present members of the Appeal Court supplemented by the Law Lords.

Any scheme for limiting appeals to one seems to involve the abolition of the House of Lords, and it would follow, as Sir Reginald remarks, that Scotland would have to deal finally with her own appeals.

The scheme, coming from so weighty an authority, is likely to be discussed. And if Scottish appeals are discontinued, the justification for preserving appeals to Westminster from such distinguished bodies as the Supreme Courts of the Dominions and of India becomes less easy. The Judicial Committee without Dominion and Indian appeals would lose its peculiar Imperial position. It is to be hoped that sufficient practical advantage will be found to support sentiment, so that this "outstanding symbol of unity," as Lord Macmillan phrases it, may continue in some measure to preserve its world-wide authority.

**The Legislation of the Commonwealth.**—All those who have profited by the excellent collection of the Acts of the Commonwealth Parliament up to 1911 prepared by the present Solicitor-General of the Commonwealth will welcome the new consolidation up to 1932 prepared by Messrs. B. J. McGrath and G. J. O'Sullivan, with the aid of Mr. W. J. Dignam, editor of the *Australasian Annual Digest.* The legislation of the Commonwealth in the last twenty-one years has been copious and most important ; the Commonwealth has elaborated a system of navigation legislation, has specialized in income-tax, and provided a code of bankruptcy, while its financial undertakings in respect of State debts have involved constitutional change and much legislation. The activity of the courts has been unceasing, and nothing can be more valuable than to have virtually the whole of the legislation made acccessible in four volumes with the fullest possible references to the cases in which sections of the Acts have received comment. Moreover, the first volume includes the Constitution with its amendments, the Colonial Laws Validity Act, 1865, and the Statute of Westminster, 1931, which, it will be remembered, is not yet in force in the Commonwealth, while vol. ii includes the Rules of the High Court, which are indispensable as an adjunct to the High Court Procedure Act. It has not, of course, been possible to include the text of regulations made under the Acts, subject as they are to constant variation, but in the Index volume references are given to them up to February 1, 1933. Very useful also is the practice by which in the case of each Act there is noted the precise section of the Constitution under which it derives its validity, while care has been taken to note the date of commencement of such Acts or parts of Acts as are appointed to take effect from dates to be proclaimed. The Index treats of the consolidated Acts each separately, incorporating the legislation of 1932 in addition to that of 1901–31 which is included in the first three volumes, and twenty-one pages are devoted to a Table of Cases in which Commonwealth Acts and Rules have been judicially considered.

The editors have very wisely included in their work certain Acts which have been repealed, have expired or been declared invalid, because of their historical importance and the light they throw on the powers of the Commonwealth and the meaning of existing Acts. Their omissions are confined to Supply, Loan and certain Appropriation Acts and to certain tariff schedules ; in the last case the motive is " the practice of altering the tariff by administrative action and passing subsequent Customs Tariff Validation Acts." In fact the power of the Senate has largely been destroyed as regards the tariff by this procedure, under which, for instance, the proposals laid before the lower house on November 21, 1929, were passed into law only on November 26, 1931 (Act No. 53 of 1931).

Repeated consultation of the work proves that it has been compiled with the greatest skill and care and that it is indispensable to any person who is concerned with the law of the Commonwealth. The only omissions which criticism can suggest are those of a list of the Ordinances made by the Governor-General for the Northern Territory, New Guinea, Norfolk Island and the Seat of Government, and of an allusion to Mr. Deakin's abortive measure of 1906 for preference to British manufactures,[1] the sole measure passed by the Commonwealth Parliament which, having been reserved, was never assented to by the Crown.

A. BERRIEDALE KEITH.

**Territory of New Guinea.**—The " Mandate for the German Possessions in the Pacific Ocean situated south of the Equator, other than German Samoa and Nauru," issued by the Council of the League of Nations on December 17, 1920, gave to the Government of the Commonwealth of Australia full powers of administration and legislation over the Territory of New Guinea subject to the Mandate as an integral portion of the Commonwealth of Australia, and permitted the Government of the Commonwealth to apply the laws of the Commonwealth to the Territory, subject to such local modification as circumstances might require.

The New Guinea Act 1920 of the Commonwealth of Australia declared that the territories and islands specified in the Act, being the former German possessions described in the Mandate, should be a Territory under the authority of the Commonwealth by the name of the Territory of New Guinea ; and enacted that, except as prescribed in that Act or any Act, the Acts of the Commonwealth of Australia should not be in force in the Territory unless expressed to extend thereto or unless applied to the Territory by Ordinance made by the Governor-General under that Act. The Act also authorized the Governor-General to make Ordinances having the force of law in the Territory.

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[1] Keith, *Responsible Government in the Dominions* (1912), iii, 1109 f.

From May 9, 1921, the commencement of civil administration, until May 2, 1933, the Governor-General of the Commonwealth in Council made Ordinances having the force of law in and in relation to the Territory. The New Guinea Act, 1932, which amended the New Guinea Act, 1920–26, created an Executive Council and a Legislative Council. The Legislative Council is comprised of the Administrator and eight nominated official, and seven nominated non-official, members. There is therefore an official majority. Subject to the provisions of the New Guinea Act, 1920–32, the Legislative Council has power to make Ordinances for the peace, order and good government of the Territory. The first sitting of the Legislative Council of the Territory was held on May 9, 1933, at Rabaul.

The Laws Repeal and Adopting Ordinance, 1921–31, amongst other things, provides that: (1) German laws shall cease to apply to the Territory; (2) subject to the Ordinances of the Territory, native customs and usages not repugnant to the general principles of humanity shall be allowed to continue; (3) specified Acts of Parliament of the Commonwealth so far as they are applicable shall apply to the Territory; (4) specified legislative acts of the military Administration during military occupation of the Territory shall continue in force; (5) specified Acts of the State of Queensland shall be adopted as laws of the Territory; (6) those portions of the Acts, Statutes and laws of England that were in force in the State of Queensland on May 9, 1921, shall be adopted as laws of the Territory, so far as the same are applicable to the circumstances of the Territory and are not repugnant to or inconsistent with the provisions of any legislation having the force of law in the Territory; (7) specified Ordinances of the Territory of Papua shall be adopted so far as they are applicable to the circumstances of the Territory; (8) the principles and rules of common law and equity that were in force in England on May 9, 1921, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory.

The following are amongst the principal Ordinances in force in the Territory: Criminal Code, the Queensland Criminal Code has been adopted as a law of the Territory; District Courts Ordinance, 1924–33, providing for the establishment of courts of summary jurisdiction and the jurisdiction and proceedings thereof, the appointment of justices of the peace and their powers and duties, and for other purposes; Goods Ordinance, 1924, consolidating the law relating to dealings in goods; Immigration Ordinance, 1932–3; Judiciary Ordinance, 1921–32, establishing courts of law—the Central Court is established as the supreme court of the Territory and given the jurisdiction of the Supreme Court of Queensland; Land Ordinance, 1922–33, regulating the dealing with land and for other purposes; Lands Registration Ordinance, 1924–33, relating to the registration of the title to, and the dealing with, estates in land; Legal Practitioners Ordinance, 1928–33; Medical Ordinance, 1924–31, relating to medical practitioners and dentists; Mining Ordinance, 1928–33; Native Administration Ordinance, 1921-7, providing for the control and administration of native matters; Native Labour Ordinance, 1922–33; and the Quarantine Ordinance, 1931.

GERALD HOGAN.

**Comparative Legislation within the Empire.**—Throughout the establishment of a world-wide Empire England, in contrast with other colonizing countries, has been guided by an established principle of constitutional law that in colonies acquired by conquest or cession the existing law remains in force, *mutatis mutandis*, unless and until it has been abrogated by the new governing power. The result is that a considerable body of foreign law remains in force in the British Empire. Details are given in an informing article in the March number of the *Round Table*. The foremost place is assigned to the law of France, which, in different forms, can be found in the Channel Islands and Scotland. In Quebec, St. Lucia, Mauritius and the Seychelles, especially the first, however, French law finds its real field of operation. Roman-Dutch law remains in force in South Africa and Ceylon, while the substitution of English law in British Guiana has not wholly removed the influence of Roman-Dutch law. The *Round Table* contributor does not dwell upon the maintenance of Hindu, Mohammedan and Buddhist law as well as the customary laws of the Native States in India, but it is a point which deserves more attention at a time when the influence and attitude of the British régime are under discussion. The writer concludes by claiming that this principle of a great colonizing Empire "has contributed in no small measure to the enrichment of her jurisprudence and the durability of the Empire." It may be permitted to add that nowhere is there greater reason for the work of a strong and widely supported Society of Comparative Legislation.

**The Background of Legislation.**—Recent events have demonstrated the extent to which the nations of the world are faced by similar problems. Moreover facilities of transport and communication have increased the opportunities for the assimilation of ideas and the removal of distinctive features. To these important factors in the life of all the civilized nations the wireless has been added as an influence with unknown possibilities. The comprehensive symposium on the changing world designed by the British Broadcasting Corporation to reveal the quick succession of changes which have taken place in the modern State since the beginning of the century is an example of the contribution which can be made by means of the wireless to the study of national as well as international problems. The series of talks published under the title of "The Modern State"[1] is significant for the way in which the speakers have dealt with the various branches of the subject from a broad point of view in marked contrast with the insularity generally supposed to be characteristic of English thought. The result is a volume of singular value to those who are concerned to study the conditions necessitating legislation.

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[1] (London: George Allen & Unwin.) Pp. 320. Price 7*s*. 6*d*.

Mr. Leonard Woolf and Lord Eustace Percy discuss the developments of the idea of democracy, which has undergone enormous changes during the present century through the extension of the electorate. Professor Adams examines the value and defects of parliamentary government, and after comparing other systems still considers that it contains the best possibility for the future. Sir Arthur Salter, however, foresees a time when some international body will take an important part in guiding if not controlling national legislative activity. The distances which provide difficulties for the different parts of the Empire to appreciate the European conditions are being lessened with remarkable rapidity. The cessation of emigration is a serious factor in the opposite direction. One conclusion which can be drawn quite definitely from this study of current problems is that obstacles of this kind must be removed since they are operating against natural forces, and Imperial unity is more important for the welfare of the world than European harmony.

**Law Reporting in Palestine.**—The *Palestine Post* newspaper, following the well-known example of *The Times*, commenced in December 1932 to publish reports of law cases by advocates of the Palestine Bar. Partly from considerations of space and partly, no doubt, because a daily journal must look to the " news-value attraction " for the general public as well as to the interest for the legal profession, these reports vary a good deal in value. Nevertheless, the Editor deserves the gratitude of the Palestine legal profession for his enterprise. It is difficult to imagine a country in which law reporting can play a more beneficent part than Palestine with its conflict of legal systems, its obscure and often inadequate Turkish codes. The one argument which can be advanced against law reporting in the infancy of a legal system, namely, that without reports the judges are more free to correct their own mistakes, disappears when we find that already the Supreme Court at Jerusalem is following its own previous rulings with strictness, even when it disagrees with them—see *Abu Ja'afar v. Mustapha.*[1]

**Moslem-Jewish Marriage.**—One of the most interesting cases reported is *Simha v. C.E.O.* (January 25, 1933), which confirms an opinion advanced by Dr. Goadby on p. 137 of his *International and Inter-religious Private Law*, to the effect that a Moslem court has no jurisdiction over a Jewish or Christian party to a mixed marriage. In this case a young Jewess ran away from home and " secretly " went through a form of marriage with a Moslem, who subsequently " converted " her to Islam. Being (as she alleged) cruelly maltreated by him, she ran away and returned to her father's house and faith. The husband thereupon sued

[1] *Palestine Post*, March 23, 1933.

in the Sharia Court for his wife to be seized and delivered over to him, and obtained a decree which was sent to the Chief Execution Officer for execution. Apparently arrest and imprisonment, not seizure and delivery, was the form of execution actually contemplated. An objection was carried to the Supreme Court, where it was held that as the wife was only 17 years of age at the date of the alleged conversion to Islam, and as the consent of her natural guardians had not been obtained, the conversion was invalid under s. 4 of the Change of Religious Community Ordinance 1927; and consequently the Sharia Court had no jurisdiction over her. Query: Could it have exercised jurisdiction over the Moslem husband of a mixed marriage at the suit of a Christian or Jewish wife? The argument from convenience is in favour of a single forum.

Upon the further suggestion in this case that the marriage was invalid, the High Court did not find it necessary to pronounce. The marriage of a Moslem and a Jewess is valid by Moslem law, but invalid by Jewish law. Both systems alike [1] recognize the right of a girl who has attained puberty to dispose of her own hand in marriage, even in opposition to the wishes of her guardians. But if the word "secretly" implies that less than the minimum number of witnesses required by Mohammedan law was present, then the marriage was *fasid* (invalid) even in that system: and there is some authority for saying that a marriage is also *fasid* where the bride's legal guardians, even though powerless to object, have not been previously informed. No *fasid* marriage can lawfully be enforced: and, if this marriage was *fasid*, then the Sharia Court's decree was wrong on yet another ground.

Three other criticisms may be offered: first, that a suit for the restoration of conjugal rights by the actual seizure and delivery of the wife is an anachronism which ought no longer to be permitted in a country under British rule—even the modification of this to imprisonment of the wife is obsolete in England and India. Secondly (and this is a consideration which is borne out by several other cases reported during the year) the religious courts should be brought very much more closely under the control of the Supreme Court. The more radical remedy of placing the administration of religious law in the hands of the ordinary courts (as is done in India) is unfortunately not practical politics at the present time. Thirdly, s. 181 ("Bigamy") proviso *c* of the Palestine Criminal Code Bill 1933 protects the polygamous rights of a Moslem husband without reference either to the nature of the ceremony or the religion of the wife. In this respect it contrasts unfavourably with the legislation of the East African territories.[2] The jurisdiction of the civil courts over mixed marriages having been established, legislation on lines similar to the East African precedents appears desirable. S. V. FG.

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[1] At least, the Hanafi school of Muhammadan law and the orthodox Rabbinical law; Malikis and Shafiis in the one faith and Karaites in the other hold that no unmarried woman, whatever her age, is free from control in this respect.

[2] See FitzGerald, *Muhammadan Law*, p. 88.

# NOTICES OF BOOKS.

## THE BRITISH CONSTITUTION.

SEVEN years ago Mr. C. S. Emden published through Messrs. Methuen & Co. a notable little book entitled *Principles of British Constitutional Law* which showed that he possessed an unusually extensive and complete knowledge of the working of the governmental machine in this country. In particular he made it clear that in actual practice the old sharp distinction between the legislature, the executive and the judiciary—so strongly emphasized by Montesquieu, Blackstone, and others, in the eighteenth century—has to-day wholly ceased to exist.

In his new book,[1] the fruit of wide reading and mature thought, he pursues the same investigation into the realities of present-day practice, attempting to penetrate behind the appearances of politics to the veritable seat of constitutional power. It is curious that although the conception of the " sovereignty of the people " has been current at any rate from the days of Rousseau, if not from those of Lilburne, no previous writer should have made an effort to discover precisely how the people have attained to sovereignty, and how at the present time that sovereignty is exercised. Mr. Emden's dissertation has thus the merit of originality as well as that of high interest and practical importance. It is, indeed, one of the most considerable contributions to the study of the British Constitution made in recent years.

Although Mr. Emden's work is primarily historical, he treats his subject topically rather than chronologically. He investigates, first, the increasing control of public opinion over Members of Parliament and over the determination of policy. He then traces the evolution of political parties and the growth of party organization. Next he shows how " the people " have more and more come to decide directly the composition and the fate of ministries. Finally he indicates the gradual process by which ministers have increasingly tended to look to the people rather than to Parliament for mandates and missions.

Mr. Emden's task has been one of peculiar delicacy and difficulty. It is no easy matter, especially in respect of earlier centuries, to know where to listen in order to catch the authentic *vox populi*. Mr. Emden has consulted not merely the ordinary books of constitutional reference, but has made a laborious and extremely productive investigation both of parliamentary debates and of the immense pamphlet literature of the modern world. His scholarly and dispassionate work is not unworthy of a place beside the classic treatises of Dicey and Anson.

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[1] *The People and the Constitution*. By Cecil S. Emden. (London: Humphrey Milford; Oxford: Clarendon Press.) Pp. xii + 325. Price 15*s*. net.

F. J. C. Hearnshaw.

## THE CONSTITUTION OF NORTHERN IRELAND.[1]

In his first volume on the Constitution of Northern Ireland, warmly welcomed in our Journal two years ago, Sir Arthur Quekett summarized the steps by which the Six Counties received and began to exercise their present autonomy. His second volume now completes his task by giving us the actual text of the constitutional enactments (from the Government of Ireland Act, 1920, onwards) and of the adaptation orders. Reference to the miscellaneous contents of the latter is made easy by very thorough indexing. The annotation is judicious and scholarly. The note, for instance, on "existing laws" (section 61 of the 1920 Act) is an important statement, never before so clearly put, on the statute law of Ireland, the reception of English common law in Ireland, and the two assimilations of Irish to English statute law under Poynings' law and Yelverton's Act. Among other particularly valuable notes there is one (part of an Appendix on Local Institutions and Authorities) on the office of the sheriff and another on appeals from Irish courts to the House of Lords.

The Government of Northern Ireland came into being in May 1921. The machine would hardly be recognized by Gladstone and other Home Rule engineers of an earlier day whose plans Sir Arthur Quekett described in the introduction to his previous volume. Built to the 1920 specification, in part dismantled just as the wheels began to revolve, it would have been differently designed if its present requirements could have been foreseen. Successive sessions of the United Kingdom Parliament are removing some of its checks and the final form may some day surprise its inventors. Constructed of materials partly old and partly new, it has worked without a hitch under conditions requiring legislative extemporization. For those who sought to understand its operation—English lawyers, for instance, wrestling with a point about revenue or pensions—guidance was at first lacking. This defect has been remedied from two sources. First the Statute Law Committee of Northern Ireland has issued its admirable Chronological Table and Index of the Statutes affecting Northern Ireland (already in its second edition). And now Sir Arthur Quekett has produced an indispensable text-book.

C. T. C.

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[1] *The Constitution of Northern Ireland*, Part II, The Government of Ireland Act, 1920, and subsequent enactments. By Sir Arthur S. Quekett, K.C., LL.D., Parliamentary draftsman to the Government of Northern Ireland. (Belfast: H.M. Stationery Office, 1933.) 31*s*. 6*d*. net.

## CONSTITUTION OF THE IRISH FREE STATE.

THIS book[1] is a remarkable achievement. It is the work of a German student upon the latest and most original Constitution within the British Commonwealth of Nations, which, as the Chief Justice of the Free State says, in his introduction, " presents for the first time the forces and tendencies, historical, political, moral and intellectual, which consciously or unconsciously . . . came together in the making of the instrument."

It is remarkable that several leading books on English political institutions have been written by foreign scholars. Vinogradoff on the English Village ; Liebermann on Anglo-Saxon Laws ; Professor Namier's Study of English Political Structure in the Reign of George III, are notable examples. And the young author of this book, though dealing with contemporaneous documents and contemporary history, has brought to his work the same kind of objectivity and of comparative science as those other historians who were dealing with the past formative periods. The Chief Justice summarizes his treatment thus : " In the first place, the matter is illuminated by being placed against an historical background. . . . In the second place, each provision is so discussed in relation to the existing and previous law and practice as to exhibit its full legal import, and the effect of subsequent legislation and decisions upon it is shown. Thirdly, the place of each provision in the Constitution as an organized whole is considered with critical examination of its adequacy to its purpose. . . . Finally, students generally will find in the work a valuable technical study in the mechanics of government, legislative, executive and judicial."

The outstanding feature of the study for those interested in the development of the British Commonwealth is that the Anglo-Irish Treaty of 1922, which is the foundation of the Constitution, is an international pact made as between independent States. That is a characteristic expression of the distinctive State of Ireland as compared with the Overseas Dominions. It implied the admission of Ireland's constitutional co-equality with Great Britain ; and it led on to the change in the relations between Great Britain and the Dominions that is embodied in the Statute of Westminster. The treaty was registered by the Free State Government with the League of Nations in spite of a protest by the British Foreign Office, made on the ground that the Covenant of the League was not intended to govern the relations of various parts of the British Commonwealth. Even the provisions with regard to the limitation of Irish military forces and the use of Irish waters by British Naval forces are expressed as a concession by an independent State ; and the former also is based on the purpose " of securing the observance of the principle of international limitation of armaments." It is interesting to compare these provisions with those in the Treaty between Great

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[1] *The Constitution of the Irish Free State.* By Leo Kohn. (London: George Allen & Unwin, Ltd.) Pp. 423. Price 16*s*. net.

Britian and 'Iraq, which was made preparatory to the termination of the Mandate. As the author points out, a nationally self-conscious European State was introduced into the symmetry of the Empire, in the garb of " Dominion status," and was bound to transform the entire framework of Dominion association by its revolutionary origin and nationalist inspiration. Instead of the Dominion Constitutions moulding the development of the Free State, the Constitution of the Free State has tended to transform the relations of the Dominions.

The provisions in regard to Irish nationality, or, as it is more correctly termed, citizenship, are equally interesting, but less definite. The Constitution contemplated the passing of a law of nationality to determine the conditions governing the acquisition and termination of Free State citizenship. But twelve years have passed and the law has not yet been enacted. Citizenship at present is restricted to the persons who are covered by the Article in the Treaty. It is conferred thereby on persons domiciled in the Free State at the time of the coming into force of the Constitution who were born in Ireland, or either of whose parents was of Irish birth, or who had been ordinarily resident in the Free State for not less than seven years before the enactment of the Constitution. Persons born in Ireland since the Free State was constituted at present do not acquire such citizenship ; and there is as yet no provision for naturalization. It is remarkable that British subjects living and even domiciled in Ireland, but not possessing these specific residential qualifications prescribed by the Constitution, are deprived of the privileges of active citizenship, such as a vote or eligibility to office. On the other hand, Irishmen living in Great Britain have full British citizenship. These and other anomalies will no doubt be remedied in time.

The supreme interest of the Irish Constitution is that it gives a new direction to fundamental institutions within the British Commonwealth. It is alone, for example, among British Constitutional instruments in setting out the fundamental rights of the individual. And it breaks new ground in introducing Functional or Vocational Councils representing branches of the social and economic life of the nation. Lastly it seems to offer a most valuable precedent for a full recognition of national life within an international union.

NORMAN BENTWICH.

## THE CABINET COUNCIL OF ENGLAND.

ENGLAND owes much to American scholars for the elucidation of her Constitution. The fact that the roots of American institutions lie deep in English soil has compelled Trans-Atlantic historians to re-cross the ocean and spend laborious years in exploring the vaults of the Record Office and the shelves of the British Museum. In searching for the sources of their own Constitution they have brought to light much long-hidden information respecting matters profoundly interesting and important to Englishmen. One has only to recall the work of Professor C. M. Andrews on the Committees of Trade and Plantations; Professor J. F. Baldwin's monumental study of the King's Council in England during the Middle Ages; Professor Wallace Notestein's account of the Establishment of the Committee of Both Kingdoms during the Civil War period, and Professor E. R. Turner's own detailed examination of the Privy Council of England in the seventeenth and eighteenth centuries, to realize how vastly our knowledge of the working of government in our own country has been increased by these devoted and skilled labours of American scholars.

The two volumes by Professor Turner on the Cabinet Council of England[1] now before us form a sequel and supplement to the two volumes on the Privy Council just mentioned. They were themselves to have been followed by a further two volumes in which the author intended to "picture the complete development of the English central executive and relate it to the other branches of the government." These concluding volumes, alas, will never be written. For Professor Turner unhappily died, at the early age of 48, while still his volumes on the Cabinet were passing through the press. The second of these two volumes, in fact, has had to be edited by Dr. Gaudena Megaro, and it contains an appreciative obituary notice of its author from the pen of Professor E. R. Adair.

Professor Turner left a certain amount of material collected in preparation for his two concluding volumes, and it is hoped that his executors may be able to put them together and issue them in an abbreviated form. It is much to be desired that they should do so; for the four volumes so far published on the Privy Council and the Cabinet contain such masses of detailed information (mainly in chronological order) that in some sections it is extremely difficult to see the wood because of the multiplicity of the trees. There is urgent need of the generalizer and the interpreter.

There can be no doubt, however, as to the immense value and importance of Professor Turner's researches. With an admirable technical equipment he has consulted all the relevant records, and has ransacked the political literature of the two centuries under review for illustrations and explications. It has rarely been our fortune to see a more thorough, exhaustive and entirely scientific piece of historical investigation. It will remain a storehouse of detailed information for all future generations of students of the British Constitution.

The main positive conclusion that emerges from Professor Turner's two volumes is the extremely interesting one that the Cabinet Council of the eighteenth century was a development of the seventeenth-century Privy Council Committee for Foreign Affairs. Professor Turner shows, on the one hand, how the Privy Council itself increased in numbers—from 20 in 1605 to 132 in 1801—and so became too unwieldy and too heterogeneous for effective purposes of administration. He shows, on the other hand, how from the very beginning of the Stuart period the practice of appointing committees for special purposes sprang up. There were, for example, no fewer than 72 such committees during the period of Clarendon's ministry, 1660–7. Of these committees, the most permanent and the most important was the Committee for Foreign Affairs. Professor Turner, with a skill worthy of the hero of a detective novel, traces it through all its vicissitudes, giving lists of its constituent members throughout the whole period. He also presents a minute report upon its procedure and its work. It is fascinating to observe how its functions increased and extended, until from merely managing foreign relations it became a general organ of government.

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[1] *The Cabinet Council of England in the Seventeenth and Eighteenth Centuries: 1622—1784.* By Edward Raymond Turner, Professor of European History in the Johns Hopkins University. Two volumes. (London: Humphrey Milford; Oxford: University Press.) Price 93*s.* 6*d.* net.

Professor Turner's work is not light reading. But it well repays the careful study of all who are interested in the development of the British Constitution.

F. J. C. HEARNSHAW.

## FREUND ON LEGISLATION.[1]

THE late Professor Freund's *Legislative Regulation* (a complementary volume to his *Administrative Powers*) has helped to give legislation a place in legal science and legal education. Described on its title-page as a study of the ways and means of written law, the book analyses those written rules, adventitious and often resented as unnecessary, which exhibit the State's impact upon our natural freedom. It discusses problems of phraseology and style, forms and methods, and the technique of penal and civil regulation. There is a wealth of instances well chosen from the statute-books of many States and countries. English types are aptly and correctly cited though one or two references are not pedantically accurate—*e.g.*, "the Medical Practice Act of 1858," "the Companies' Directors Liability Act of 1890," and "the Children's Act of 1908" with its apostrophied possessive. A monument to Freund's gift of industry and his skill in classification, the book is no mere catalogue of precedents. He takes account of the atmosphere and social background of law-making. He appreciates the conservative reverence for "the law of the land," the hesitation to make definite repeals, and the tendency to innovate by temporary enactment. He notices the Englishman's respect for the legislation of political opponents and illustrates it by the tolerant treatment of the Trade Disputes Act, 1906, after the general strike, and the restrained efforts of 1931 to alter the amendments of 1927. He begins his comments on the language of legislation by remarking that draftsmen must try to find words acceptable to the legislature and that administrative leniency or reluctant juries may deprive a Supreme Court of the chance of interpretation; legislative language, he concludes, is a matter of behaviourism as much as a matter of logic. He distinguishes political language by some shrewd comments:—"it is addressed to sentiment and understanding rather than to the sense of reason and logic; it disclaims literalness; it courts marginal ambiguity; it deliberately avoids the implication of legal right and obligation."

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[1] *Legislative Regulation.* By Prof. Ernst Freund. (New York: the Commonwealth Fund; London: Geo. Allen & Unwin, 1932.) Pp. 458. 22*s*. 6*d*. net.

Dealing with legislative form, Freund notes that England has no official statutory revisions; the restatement of her entire statute law is hardly feasible. Elsewhere an enacted revision has been an occasion of legal reform; the revisers both in New York in 1829 and in Illinois sixty years ago made changes in substantive law. All we can manage in England (and much more of it might well be done) is the re-writing of parts of our statute-book by the process of consolidation; this gives our draftsmen their best, if not their only, chance of orderly arrangement free from obstruction and destructive amendment. One major improvement of legislative drafting, namely the subdivision of sections, was attributed by Ilbert to Lord Thring's Merchant Shipping Act of 1854. Freund reminds us that Thring, in his *Practical Legislation*, admits having modelled the divisions and grouping of the Act upon the New York code. If we made this happy importation, we have sent abroad some dubious exports. Freund sets out our statute 1 Ric. 3, cap. 1 (feoffments to uses) and shows that section 2 of the Conveyancing Act of Illinois has copied it verbatim. "How many lawyers in Illinois," he asks, "understand what it means, assuming it does have a meaning? And may one not suspect that it is its unintelligibility which has kept it in the statute-book?" Botanists in the Westminster garden might find many legislative herbs similarly fit to be labelled *perenne quia obscurum.*

C. T. C.

## THE RIGHT TO TRADE.

A most interesting effort to deal with the vexed question of the law of England regarding the existence and extent of the right to trade has been made by Professor W. P. M. Kennedy and Mr. J. Finkelman of the University of Toronto.[1] The relevant material has been carefully collected, and is fully considered from a number of aspects; repetition is, of course, unavoidable, but no other form of treatment would suffice to elicit the bewildering variety of judicial pronouncements. It is made clear that judicial interpretation has been affected at one time by the desire to insist on individual rights, at another by acceptance in some measure of the view that the good of the individual may demand his solidarity with others in like position. The position so far achieved is unsatisfactory, nor is the time ripe for legislation. In the meantime all those who have practical issues to deal with will profit greatly by the mass of material analysed.

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[1] *The Right to Trade. An Essay on the Law of Tort.* (Toronto: University Press, 1933.) Pp. xv + 134.

The most important suggestion pressed by the authors is probably the doctrine that it is unsound to deny tortious character to an act, otherwise lawful, done by an individual with the intention of injuring another as opposed to benefiting himself, and to asserting it of similar actions done in combination, though that is no doubt the doctrine favoured by authority.[1] Their arguments (pp. 108–11) are sufficient to show that none of the grounds adduced for asserting liability in the case of a combination as opposed to an individual is valid; under modern conditions an individual may easily be able to inflict greater injury than any combination, and be less easy to resist. No doubt there is the consideration that it is much easier to prove a combination to injure than the necessary purpose in the individual, but it is to be hoped that in the interests of logic and justice alike the ultimate result may be that any act whether of an individual or of a combination done solely, or perhaps primarily, with intent to injure should be actionable.[2]

An appendix of Canadian cases is added (pp. 115–30) which to non-Canadian readers would have been more valuable if the effect of the cases had been briefly summarized in every instance, but which doubtless will be of great convenience to Canadian lawyers.

A. BERRIEDALE KEITH.

## GREAT BRITAIN AND THE LAW OF NATIONS.[3]

PROFESSOR SMITH is to be whole-heartedly congratulated on his enterprise and industry in editing this selection of diplomatic documents, which is designed to illustrate the views of the British Government upon the various aspects of International Law. It is remarkable, as he points out in his preface, that the idea of publishing a selection from the opinions of the Law Officers, which was mooted so long ago as 1854, has never borne fruit in action, whereas in the United States the opinions of the Attorneys-General are published regularly, and the digest of International Law edited by J. B. Moore has been an invaluable storehouse for jurists and diplomatists. It is anomalous that the practical interpretation of the Law of Nations by British Governments should be hidden in the breasts of the Law Officers, or stored away in the archives of the Foreign Office. The documents contained in this volume —which is designed to be the first of a series that will cover the whole field of International Law—for the most part date from the period of the French Revolution. The matters dealt with are the nature, source and scope of International Law, the dependence and independence of States, the recognition of States and Governments, the recognition of belligerents, and the successsion of States and Governments. Professor Smith has realized that a mere collection of the legal opinions and pronouncements of the Law Officers would not be adequate. It must be accompanied by documents which illustrate the historical facts that provoked the opinions. He has printed, therefore, or rather edited, a number of diplomatic documents, dispatches and the like that bear upon the topics of International Law under review. All law, as he says: " whether national or international, is the child of history, and can only be understood aright with some knowledge of the purpose which it was intended to achieve. Conversely, it is true to say that an imperfect knowledge of history has sometimes been the parent of very bad law." On the other hand, he has not included in his collection judgments of the British courts. In that omission we think that he is justified. Selections of cases, and admirable digests of all cases in recent years concerning International Law, are readily available for the student. It is just the diplomatic side of the matter which has hitherto been obscure.

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[1] *Quinn* v. *Leathem*, [1901] A.C. 495, per Lords Halsbury, Shand, Macnaghten and Brampton; *Sorrell* v. *Smith*, [1925] A.C. 700, per Lords Dunedin and Buckmaster.

[2] Cf. Dr. Jenks, *Journ Comp. Leg.*, Third Series, vol. xiv, pt. iv, pp. 210–14.

[3] *A Selection of Documents illustrating the Views of the Government in the United Kingdom upon Matters of International Law.* Edited by Herbert Arthur Smith, M.A., Barrister-at-Law, Professor of International Law of the University of London. Vol. I, Statutes. (London: P. S. King & Son, Ltd.) Pp. 416. Price 16*s*. net.

It is another striking and, in our opinion, admirable feature of Professor Smith's work that the documents " have been woven into the texture of a narrative." It is not, then, an impersonal compilation, but a jurist's collection of historical matter. We agree with the author that " the bare digest is seldom digestible, and the usefulness, even of a book of reference, seems to depend in some measure upon its literary form." In this connexion it is a gain that the book is an unofficial publication, so that the editor has been free to use his documents as a man of letters as well as a Professor of International Law.

We have no criticism to offer of either the selection or of the manner in which the abundant material has been edited; excepting only that the absence of any documents dealing with the succession of States as the result of the World War is to be regretted. Perhaps the Diplomatic record with regard to the transfer of Palestine, 'Iraq and other territories placed under British Mandates in 1919 and 1920 is not yet available. But we may hope that, before Professor Smith completes the great task to which he has set himself, he will have the material for a supplementary volume. The present volume is offered as an experiment. It is earnestly to be hoped that the experiment will lead to the full achievement.

NORMAN BENTWICH.

## A GUIDE TO DIPLOMATIC PRACTICE.[1]

THIS, the third, edition of the late Sir Ernest Satow's invaluable work is the result both of compression and of expansion. Whereas the first edition, published in 1917, was in two volumes of 812 pages in all, and 641 sections, the present edition is in one volume of 519 pages and 864 paragraphs. To quote from Mr. Ritchie's preface, " the long lists of congresses and conferences, dating from 1648, which were set out in the former edition have been replaced by a chapter descriptive in general of such assemblies, supplemented by outstanding instances of the numerous conferences held within recent years. Similarly, events of an earlier epoch which were narrated in the chapters on good offices and mediation have been omitted, those subjects being included with others in a series of chapters on the League of Nations. . . . The chapters on treaties and other international compacts have also undergone revision, former instances being replaced by others more recent ; while a chapter has been added on the British Commonwealth of Nations." The present reviewer can speak from experience of the practical utility of this book, but apart from its usefulness as a guide to some of the more formal problems of international intercourse, it is not without charm for the reader in search of instruction and entertainment. The chapter entitled " Advice to Diplomatists " may be particularly recommended.

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[1] By the late Sir Ernest Satow; third edition, by H. Ritchie. (Longmans, Green & Co.) Pp. x + 519. Price 36*s*.

M. S. A.

## THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO.[1]

THIS volume is the second in a series of studies entitled " Mexico in International Finance and Diplomacy " prepared under the auspices of the Columbia University Council for Research in the Social Sciences. Mr. Dunn, who was for a time Assistant Solicitor in the Department of State, has had access to the material in the archives of the Department bearing upon the relations between the United States and Mexico for over a century. The result is a study, based on examination of the diplomatic correspondence and the decisions of claims commissions, of the rôle which the subject of diplomatic protection has played in the relations between the two countries. The arrangement is partly chronological, partly by subject. After making allowance for a number of factors, Mr. Dunn concludes that " as a whole the record of the operation of diplomatic protection in the relations between the United States and Mexico has been surprisingly bad." The main explanation for this result is found not in the deficiencies of individual officials or of governments, but in the international law itself which encourages diplomatic pressure for exclusive national ends.

S. H. BAILEY.

## THE CIVIL LAW OF PALESTINE AND TRANSJORDAN.[2]

MR. HOOPER, who is now the Judicial Adviser of the Government of Transjordan, possesses an admirable industry. During the time that he was a Judge in ʻIraq, he produced a valuable book on the Constitution of ʻIraq, and another on the Civil Procedure of that country and Palestine. Now that he has been moved to a neighbouring country, he has set himself to make available for the growing public which is interested in it an exact translation and an exposition of the Ottoman Civil Code, which is still in force in Palestine, Transjordan, Syria and ʻIraq—though no longer in force in Turkey. There have been other English translations of the Code, which is generally known as the Mejelle. They were made by English judges in Cyprus, Sir Charles Tyser and Dr. Grigsby. But they have been out of print for some time. Mr. Hooper, who has an exceptional mastery of Turkish, and is also a scholar of Arabic, has made a completely new translation of the Code from the most reliable Turkish text, checked with the translation into two Arabic versions. His rendering, then, may be taken as authoritative. And if it is not a work of art as a piece of English, the sacrifice of literary form to accuracy is justified.

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[1] By F. S. Dunn. (London : Humphrey Milford. New York : Columbia University Press, 1933.) Pp. vii + 439. Price 33s.

[2] By C. A. Hooper, Judicial Adviser to the Government of Transjordan. Vol. 1. (Jerusalem : Azrael Printing Works, 1933.)

The volume under review is the first of two. The second, which will contain an exposition of the whole Code, will be awaited with the greatest interest. No English commentary on the Mejelle has yet appeared, and it will be invaluable to judges and advocates practising in the Middle East, as well as to students of Comparative Law everywhere, to have before them in English the accepted interpretation of the Code. That Code, indeed, is both in substance and in form of peculiar interest. It is not, as one might expect, an ancient text. It was compiled in the second half of the nineteenth century, when the Turkish Government indulged in a mild ardour of legal reform, in the hopes of getting rid of the burden of Capitulations. But if it is not an ancient text, it is a compilation, or rather a consolidation, of an ancient system of law. The Civil Code, unlike the other Codes of Turkey, which were poor unscientific imitations of the French models, is based entirely on the Moslem jurisprudence. It is an attempt to arrange that jurisprudence on matters of civil right, other than questions of the personal status, in some orderly fashion, divided into sixteen books, which are again sub-divided into chapters. Book 1 deals with Sale, Book 2 with Hire, Book 3 with Guarantee, etc. Each book has an introductory section, which expounds the terms of its topic of law. And at the head of the whole Code there is placed an introductory section which starts off with a definition of Moslem jurisprudence " as the knowledge of the precepts of the Divine Lawgiver, in their relation to human affairs," and then contains ninety-nine maxims, or fundamental principles, such as, " Certainty is not dispelled by doubt," " Injury cannot exist from time immemorial," " The lesser of two evils is preferred."

The Ottoman Code of Civil Law has been maintained in force in Palestine and Transjordan, with comparatively small modification. While the British Mandatory, particularly in Palestine, has found it necessary to replace the Ottoman Codes of Commercial Law, Criminal

Law and Criminal Procedure which were all Frenchified, it has found it wise to leave in force for the most part the rules as to civil relations that have, for the mass of the population, the sanction of religion and tradition. The Turk, in his modernizing reforming enthusiasm, has swept away the whole law in his own territory, and replaced it by the up-to-date Swiss Code. And in Cyprus, where the Turkish Law held sway till a few years ago, the Colonial Government has recently superseded it. In Palestine, however, the modifications concern principally the adjective law of evidence. Mr. Hooper, although he entitles his book "The Civil Law of Palestine and Transjordan," has not indicated in his translation of the text those articles of the Ottoman Law which are no longer in force in those countries. Perhaps he will draw attention to these changes in the second volume of the Commentary. As the text stands, it is slightly misleading to those who are not versed in the Palestine legislation.

The work has been produced by a Jewish press in Jerusalem, and the form and printing are most creditable. The proof reading, too, has been done with exceptional care and thoroughness. The reviewer has been unable to find a single error. That is an added tribute to the diligence of Mr. Hooper.

N. BENTWICH.

## CRIME, LAW, AND SOCIAL SCIENCE.[1]

THIS book is based on the report of a survey which was made under the auspices of the School of Law of Columbia University for the Bureau of Hygiene for the purpose of determining whether or not it is desirable to establish an institute of criminology and of criminal justice. On the whole a good case seems to have been made out for the establishment of an Institute of this kind.

Many of the conclusions and recommendations put forward are, however, open to objection in so far as they are based on evidence which is often incomplete. In some degree this is due to an endeavour to cover too large a field, but at times the authors are decidedly dogmatic and in some instances somewhat uncertain in their facts.

It seems unsafe to find—that criminological research has yielded no knowledge of the etiology of criminal behaviour and that therefore crime can now be prevented or controlled only by chance—or that existing psychological and sociological knowledge is of limited utility in the solution of legal problems.

The most useful part of a rather discursive but readable book lies in the information which is given in the course of discussion on such questions as :

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[1] By Jerome Michael, Professor of Law in the Columbia University, and Mortimer J. Adler, Associate Professor of the Philosophy of Law in the University of Chicago. (London : Kegan Paul, Trench, Trübner & Co., Ltd.) Pp. xxix + 440. Price 15s.

The value of different kinds of knowledge in the solution of the various practical problems engendered by the phenomena of crime.

The separation of the field of criminology from that of criminal justice in terms of the kinds of knowledge needed to solve their respective problems.

The relation of law to the social sciences, the extent to which and the way in which such knowledge is useful in the solution of legal problems, either by the legislator, the judge or the jurist.

The authors remind us that in recent years American University Law Schools have undertaken and projected reforms in legal education in the belief that the study of law should be more closely affiliated with the study of the social sciences—in short, to introduce both the content and the methods of the social sciences into the study and the practice of the law. Current controversy as to the issues thus raised has failed in clarity, and the book is of value to students who are prepared to follow the arguments put forward in an attempt to clarify some of these issues in certain forms of jurisprudence.

C. Clifton Roberts.

## EARLY LEGISLATION.

To the series of Harvard Historical Studies, which contain some permanently valuable volumes, has been added a laborious study of "The Influence of the Commons on Early Legislation," by Professor Howard L. Gray.[1] It is claimed that this study has been made "in a new way" by interpreting enrolled records "in the light of the antecedent material from which they were compiled." In order to interpret the earlier rolls Professor Gray makes an examination of the procedure of the early seventeenth and the early sixteenth centuries. It is impossible, however, to avoid the impression that the study of the earlier documents has been influenced by comparison with the established procedure of the twentieth century.

Neither draftsmen nor record clerks were accustomed seven centuries ago to do their work with the formal rigidity of the present day established through long centuries of parliamentary procedure. So that it is impossible to feel much confidence in Professor Gray's hypothetical deductions. It would be just as reasonable to apply his analytical method to the laws and ordinances of the Crown Colonies of fifty years, or even less, ago and endeavour to draw similar conclusions.

Moreover, Professor Gray only deals with the form of legislation, and when he has shown that the "communes petitions" prevailed among the Acts which finally obtained approval, it does not follow that they gave expression to any public demand, since he definitely omits from his study "the question of the degree to which at one period or another the commons represented the popular will." The book, however, contains the early legislation in a convenient and accessible summary.

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[1] (London: Humphrey Milford.) Pp. xviii + 423. Price 22*s.* 6*d.*

## THE RELIGIOUS FOUNDATIONS OF INTERNATIONALISM.[1]

MR. BENTWICH was formerly Attorney-General to the Palestine Government and now occupies the Chair of International Law of Peace at the Hebrew University at Jerusalem. This book contains in an amplified form his first series of lectures, delivered originally in Hebrew.

Mr. Bentwich is a well-known publicist and an earnest advocate of international peace. In his book he traces the extent to which religious ideas and, more particularly, religious institutions have tended to support or otherwise pacific aspirations. He finds the earliest distinct indications of the international spirit in the writings of the Hebrew prophets, and throughout his work he conceives its propagation to be pre-eminently the mission of the Jewish people. But he does not fail to appraise and commend contributions to the common end emanating from other religious bodies, Christian, Moslem or pagan.

One may remark that there does not seem to be any necessary connexion between Religion and Pacificism. Such a connexion can only be postulated if we identify Religion with a sort of moral humanitarianism as Mr. Bentwich is, perhaps, inclined to do. Religion, however, is a conception of a relation between man and supernatural powers. It may, in certain forms, inspire international sympathies and pacificism, but this is not of its essence. The spiritual League with its seat at Jerusalem which the author dimly adumbrates would be moral rather than religious. A pacific tendency in religion is most evidently to be found among mystics, quietists and seekers after personal spiritual experience. But this type of mind does not find in leagues and the like a meet expression of its religious spirit. Its pacificism is rather the result of pursuit of personal holiness than of active humanitarianism. There is little reason to suppose that organized religions which have a firm hold over their adherents are likely to be pacific in tendency. History, indeed, teaches the contrary, as Mr. Bentwich himself shows.

The book gives ample evidence of the author's wide reading. Now and again, however, his historical statements are a little loose. It is hardly correct, for example, to say (p. 107) that the Council of Constance failed to remove the Schism. It is true that Benedict XIII still continued to claim the Papacy after the election of Otto Colonna as Martin V, but he had no support, and for practical purposes the Conciliar Pope was alone in possession even before Benedict's death.

Again, Mr. Bentwich speaks (p. 125) of the Society of Friends as originating in Holland and dating from 1658. There were groups of like-minded folk in Holland and Northern Germany, and Fox paid them more than one visit. But the English Society was autochthonous and owns George Fox as its founder. It was by his independent efforts that the meetings and discipline were established. Margaret Fox herself records the commencement of the Swarthmoor meeting in 1652. An odd slip on p. 108 dates the expulsion of the Jews from England in the fourteenth century. Locke rather than Hobbes was, surely, the dominant political philosopher in England in the eighteenth century. A comical misprint on p. 122 makes the author speak of the Treaty of Westphalia as "consecrating the principle of religious *divinity*."

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[1] By Norman Bentwich. (London: George Allen & Unwin, Ltd., 1933.) Pp. 288. Price 10*s*. 6*d*.

These, however, are minor defects. As a sketch of the tendencies at different epochs of the principal religious bodies in their relation to a common humanitarianism Mr. Bentwich's book is excellent. His knowledge, wide humanity and clarity of style combine to make it valuable and readable both as an historical sketch and as a plea for co-operation in the cause of peace.

F. M. G.

## INTERNATIONAL LAW IN NATIONAL COURTS.[1]

Miss Masters' study covers the application of international law in the courts of four European countries—Germany, Switzerland, France, and Belgium. A short introductory essay gives an outline sketch of the principal theories maintained by continental jurists upon the relation of international to municipal law. Each country is then treated separately, the subject-matter being analysed according to the same arrangement in each case.

In practice the questions calling for decision fall into two main groups. Of these one is the problem of the relation between treaties and municipal statutes. Do treaties have statutory effect *ipso jure*, and, if so, what is to be decided in cases of conflict between a treaty and a statute ? The second problem is to determine how far the non-conventional or customary part of international law is binding upon national courts.

The reader will be struck by the large measure of agreement in the judicial practice of the countries which Miss Masters has examined. This agreement in practice stands in marked contrast with the fundamental differences in doctrine which distinguish the numerous theoretical writers. So far as the practice justifies any general conclusions it suggests that the courts only apply international law upon what may be called the "receptionist" principle. That is to say, both treaties and customary rules are applied only in so far as they can be shown to have been incorporated in the municipal law by legislative or quasi-legislative process. For the extreme doctrine of the so-called "Viennese school," which demands the explicit subordination of municipal to international law, the practice of the courts affords no support whatever. If the decisions examined by Miss Masters can be taken as fairly representative of continental practice, the results do not seem to differ substantially from those with which we are familiar in Anglo-American jurisdiction.

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[1] By Ruth D. Masters. 1932. (New York: Columbia University Press; London: P. S. King & Son.) Pp. 245. Price 19*s*.

H. A. S.

## COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES.[1]

In this essay Miss Cory has summarized the principal provisions of the many hundreds of arbitration treaties which have been signed from 1820 to the present day. The word "compulsory," although essentially inaccurate, has unfortunately gained a place in the literature of international law, and Miss Cory uses it to denote general agreements to arbitrate particular disputes. The general agreements may take the form either of arbitration treaties or of "compromissory clauses" in treaties dealing with other matters.

The author has aimed at covering such a wide field in a book of modest size that she has left herself no room for any adequate discussion of the substantial problems which underlie the formal texts of the treaties. For example, her treatment of the Permanent Court and the Optional Clause is very meagre when compared with the exhaustive analysis of these topics in other books, while four short pages are manifestly insufficient for a discussion of the vital question of domestic jurisdiction. The book does not contain anything which cannot be found elsewhere, but readers who have no time for a closer study of the literature of arbitration may find it a useful summary of the main features of the treaties.

H. A. S.

## PUBLIC INTERNATIONAL CASES.

The reputation of the *Annual Digest*[2] is now so well established that the function of the reviewer is to welcome rather than to commend. The first of the two volumes under review covers a period earlier than that of its predecessors, filling in the gap of the years immediately following the peace settlement of 1919. Pressure of work has compelled Dr. McNair to transfer his share in the editorial responsibilities to Sir John Fischer Williams, but the general character of the book is unchanged and the high standard of the earlier volumes is maintained throughout.

The subject-matter of this volume naturally reflects the special nature of the problems presented by the transitional period which it covers. Cases coming from the Mixed Arbitral Tribunals are comparatively few, but the book abounds in cases dealing with the questions of recognition and state succession created by the redrawing of the map of Europe. In many countries the courts have had to solve various problems arising out of the recognition or non-recognition of the

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[1] By Helen May Cory. 1932. (New York: Columbia University Press; and London: Humphrey Milford). Pp. xiii + 281. Price 22*s*.

[2] *Annual Digest of Public International Cases*, 1919–1922 *and* 1923–1924. Edited by Sir John Fischer Williams and H. Lauterpacht. (London: Longmans, Green & Co.) Pp. lv + 510 and xlviii + 468. 45*s*. and 42*s*.

Kerensky and Soviet governments in Russia. Another important group of cases arises from the creation of the " succession States " formed out of the dismembered Empires, and the legal issues involved in these cases enter into almost every branch of ordinary law. In three decisions of particular interest (Nos. 16, 17 and 18) the Polish Supreme Court held that the present Republic of Poland is not a new creation, but is in legal continuity with the ancient kingdom. In Switzerland the Obergericht of the Canton of Zürich took the opposite view (case 42). Students interested in the problem of " Dominion status " will note that a Dutch tribunal refuses to regard South Africa as a sovereign State (case 8).

The general scheme of the *Digest* excludes the law of war and neutrality, but the editors have exercised a discretion in admitting cases under these heads which involve broader issues of international law. The effect of war upon commercial and personal relationships forms the subject-matter of an important group of decisions (Nos. 271–287), while another group (Nos. 301–309) is concerned with the legal consequences of an armistice. Cases 310–343 deal with problems of " military occupation " and provide the reader with an interesting commentary upon the Fourth Hague Convention of 1907. We are given one decision upon the old problem of " belligerent recognition," the Polish Supreme Court holding that the Ukrainians who invaded Poland in 1919 did not possess the legal status necessary to enable them to confiscate a cow.

In the volume for 1923–4 an unusually large proportion of the space is occupied with the decisions of international tribunals, and many of these are of great importance. Particular mention may be made of nine judgments and opinions of the Permanent Court, including the *Wimbledon*, Eastern Karelia, and Mavrommatis cases. Chief Justice Taft's award in the Tinoco arbitration between Great Britain and Costa Rica is a valuable contribution to the law dealing with the application of the principles of recognition and succession to revolutionary governments. The Huber award between Great Britain and Spain over the Moroccan claims covers a wide field of international law, but is particularly valuable for its analysis of the principles of state responsibility. Important contributions to the laws of war are to be found in the *Lusitania* cases and in other decisions of the U.S.–German Mixed Claims Commission. Among the decisions of national tribunals we again find a number of cases dealing with the legal consequences of recognition or non-recognition.

Notwithstanding the financial assistance granted by no less than four learned bodies, the heavy costs of production compel the publishers to charge a price so high that sales to private purchasers are likely to be restricted, but the *Digest* should by now be regarded as indispensabie in every library that professes to include international law.

H. A. S.

## FRENCH, GERMAN AND ENGLISH COURTS.

THIS admirable little book [1] gives a description of the courts of the three countries with much information as to the method of recruiting judges, their training, salaries, the composition of courts, and kindred matters.

As the author truly says, much of this information is not to be found in English sources, and it is highly desirable that it should be available.

His motto from Seneca would be a very good one for the Society of Comparative Legislation—*Soleo enim et in aliena castra transire, non tanquam transfuga, sed tanquam explorator.*

Mr. Ensor writes objectively, and he says that he holds no brief for any particular scheme of judicial reform. But this does not prevent him from indicating pretty clearly those features of the continental organization of justice which strike him as better than our own. And why not? All knowledge of foreign courts is useful, and there is not the slightest reason to fear hasty and ill-considered reforms. The danger is in over-complacency. The writer's observations as to the drawbacks of entrusting so much judicial work to unpaid and untrained magistrates, and as to the concentration of all appeals in London—to mention two points only—are well worthy of consideration. We are all too much inclined to think that our own system is part of the order of nature.

F. P. W.

## FAMILY OWNERSHIP.

THIS monograph [2] is the product of a seminar conducted by Professor A. Schultze, of Leipzig. Its author's aim is to give clearness to the picture of early Germanic family ownership by showing the development of the institution among the Anglo-Saxons. He begins with a useful section about folc-land, bóc-land, and laen-land, explaining why it is that both the laws and the charters of the Anglo-Saxons have little to say about folc-land, and therefore throw little light on the joint ownership of the family, which he claims to have been the customary law of folc-land. He then deals with certain theories of Pollock and Maitland and of Professor Chadwick which he believes to be erroneous. Pollock and Maitland, in their *History of English Law* (I., p. 251) say: "As regards the Anglo-Saxons we can find no proof of the theory that among them there prevailed anything that ought to be called 'family ownership.' No law, no charter, no record of litigation, has been discovered which speaks of land as being owned by a maegth, a family, a household, or any similar group of kinsmen." Dr. Braude thinks that Pollock and Maitland were misled owing to the influence of Ficker. They did not sufficiently remember that the Saxon charters dealt with bóc-land rather than folc-land. Bóc-land had been created by the clergy with the set purpose of circumventing the claim of the family under the older law of folc-land. To exclude such claims it was necessary to prove that the land had been "booked"; and even this was not enough unless the consent of the family's heirs had been given to the transaction. Thus in the middle of the eleventh century Toki granted land to a bishop *liberam ab omni servitio humano praeter regale.* His son Aki, a powerful king's thane, later raised a claim to the land, and it was only when the bishop had paid eight marks of gold that the land was declared *liberam a sua et ab omni parantelæ suæ hereditaria proclamatione.* From this charter Dr. Braude infers that the right of a son was so strong that it was not destroyed by the creation of bóc-land. It must not be supposed that the right of veto (*beispruchsrecht*) of the family had its rise in these last years of the Saxon period. Its roots were in the ancient folk-right of the people.

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[1] *Courts and Judges in France, Germany, and England*, by R. C. K. Ensor. (London: Humphrey Milford, Oxford University Press.) Pp. 144. 6*s*.

[2] *Die Familiengemeinschaften der Angelsachsen*, by Dr. Jacob Braude (Rechtsgeschichtliche Abhandlungen III). Verlag von S. Hirzel in Leipzig, 1932, 4 RM.

Dr. Braude's criticism of Professor Chadwick deals with a point of less general interest on which there is no need to dwell in this review.

Most of the treatise is taken up with a detailed examination of the evidence contained in the Saxon charters. In the first two centuries after their introduction by the Church, the charters were chiefly used to record the transactions of the ruling families; but even these, it is claimed, may help to throw light on the customs of the people as a whole. Dr. Braude therefore sifts the passages which speak of royal brothers sharing land and of consent being given by sons and brothers or sisters to the disposal of land. He holds that in the smaller kingdoms (though not in larger ones like Mercia and Wessex) we have clear evidence for *hausgemeinschaften*, especially for the joint ownership of father and sons and of brothers among themselves. That the customs prevailing among the free peasantry were similar has to be inferred rather than demonstrated. These customs were automatic, and there is, he admits, little or no evidence for them in the laws of the Saxon kings. There are, however, charters of the late Saxon period which deal with the affairs of the humbler classes of society, and in these when they refer to folc-land Dr. Braude finds traces of family ownership—especially of the joint ownership of lands by brothers.

Later sections of this monograph discuss the rights of married women, of widows, and of daughters in Saxon times.

Summing up, Dr. Braude claims that he has proved the existence of family ownership among the Saxons, not a mere right of veto among expectant heirs but rather the right of partners in a common property. The history of the institution among the Anglo-Saxons was unlike its history among the continental Germans. In England Churchmen evaded the rights of the kindred by the land book; on the Continent they attained their end by encouraging the custom of the *freiteil* by which it was recognized that the freeman had freedom of bequest as regards (usually) one-third of the family property.

Dr. Braude's conclusions are not revolutionary, since they follow in the main those of Liebermann and Vinogradoff, but they are valuable because they are based on a careful discussion of the evidence of the charters. It must, however, be remembered that the author's point of view is a narrow one. For a full solution of the question it would be necessary to take into account such books as Vinogradoff's *English Society in the Eleventh Century* with its remarks about " parage " based on the evidence of Domesday Book, and Phillpott's *Kindred and Clan* with its examination of the working of the family system in the payment of wergeld. It is to be hoped that the present work will not be the last written by Dr. Braude on the Anglo-Saxon family.

R. H. HODGKIN.

## COMMERCIAL LAW OF POLAND.[1]

THE commercial law of Poland includes provisions of German, Austrian, Russian and French law which were in force in parts of the present Polish State at the date of its creation. It further includes new statutory provisions enacted since that date for the whole of Poland. The two statutes of 1926 dealing respectively with the rules of conflict of provincial laws and the rules of private international law afford the necessary guidance as to the " choice of law."

The book is written in the first instance for the business man. But a student of comparative law can derive much instruction from the clear statement of the law by the author. The chapters on securing of credits, commercial procedure, taxation and the status of aliens will be found of particular interest.

V. R. I.

## CONFLICT OF LAWS IN EGYPT.

FOR the student of or the practitioner in Conflict of Laws, Egypt is an earthly paradise. The usual problems of private international law present themselves in that country with more than the usual frequency, on account of the large number of foreigners who reside there and carry on business. But over and above these questions which are international in the sense that the dispute is whether the law of a foreign country is to be applied, there is a large crop of cases of a kind unfamiliar to us, where the conflict is between two or more systems of law, which are applied in Egypt itself as part of its own system. The personal law of the individual, including marriage, divorce, succession, etc., depends on the religious community to which he belongs, and difficult questions frequently arise as to whether the matter at issue is a part of the personal law, and if so, which of many systems of personal law is to govern it.

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[1] *Handbuch des polnischen Rechts fuer den Handelsverkehr mit Polen.* By K. Freiherr von Unruh. (Breslau-Berlin, 1932.)

In this brochure,[1] Dr. Smyrniadis gives a useful sketch of this subject, and refers to many of the decisions. It might well form the nucleus of a larger book.

F. P. W.

## FOREIGN LEGAL SYSTEMS.

The fourth volume of this admirable series [2] maintains, so far as one not familiar with Rumanian law can judge, the high standard set by its predecessors, which have been reviewed in these columns.[3] The plan of the series is excellent. Each volume conforms to a prescribed scheme, and each of the eight branches into which the law is divided is dealt with by experts in that subject belonging to the country itself.

The book ought to spread some knowledge of Rumanian law among the lawyers of Western Europe, very few of whom can read Rumanian law-books in the original.

The heavy losses of Rumania in the Great War—estimated at about 225,000 men—and her broken and shattered condition in March 1918 after the Russian *débâcle* were not forgotten by the Allies at the close of the war. She emerged with her territory and her population doubled or thereabouts. The Southern Dobruja from Bulgaria, Bessarabia from Russia, the Bukovina from Austria, Transylvania and part of the Banat from Hungary were added to her. The addition of these territories, of which the population was mainly but by no means wholly Rumanian, has complicated the legal situation. The "Ancient Kingdom" had adopted to a great extent the French law, but Transylvania was governed partly by the Austrian Code, and partly by local customs, and Bessarabia had Russian customary law, and a law of succession of Byzantine origin. Since the war there have been a good many laws made which apply to the whole country, but apart from these the acquired territories retain their old law. Legal history does not fall within the scope of these volumes, and a history of Rumanian law would be enormously interesting. Down to the nineteenth century, the church law was Byzantine, and the civil law consisted mainly of Slavonic customs, often no doubt of immense antiquity. The frenchifying of the law began in 1829 with the promulgation of a commercial code translated from the French code. The civil code of 1864 was based very largely on the French civil code. Paris, long before then, had become the spiritual home of the Rumanian intelligentsia. To adopt a foreign law *en bloc* seems a strong measure, and we wish that this book had given more information as to its effect. An ex-Minister of Justice of Rumania, writing about thirty years ago, did not dispute that the new code had been in many ways beneficial to the country, the law of which had previously been rather chaotic. But Prof. Dissescou maintained that though the civil code had been in operation nearly forty years, it remained essentially a foreign law. "*Le nouveau Code, rompant entièrement avec le passé, a détruit les influences slaves, les anciennes institutions, et a introduit un système juridique souvent en contradiction avec les faits, usages et traditions de la vie réelle. Dans le Code de* 1864, *sauf quelques très rares réminiscences du passé, l'âme roumaine est absente et ne se retrouve pas.*[1]"

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[1] *Les Conflits de Lois en Egypte*, by Bion Smyrniadis, Docteur en droit, Avocat à la cour mixte d'Alexandrie. (Paris: Sirey.) Pp. 63.

[2] *La Vie Juridique des Peuples.* No. 4. *Roumanie.* (Paris: Delagrave, 1933.)

[3] Belgium—Third Series, vol. xiv, p. 157. Czechoslovakia, xv, p. 154. France, *ib.*

Possibly, by this time, the French law has taken firmer root. No doubt Savigny would have been shocked at such a transplantation of law. The Rumanian law of to-day certainly did not grow out of the popular consciousness. But if Turkey can swallow the Swiss Codes, why should it be impossible for Rumania to assimilate the Code Napoléon ?

On some matters the courts are still directed to guide themselves by local customs, and a little more information about these, and particularly about the authorities relied upon, would have added to the interest of this volume.

F. P. W.

## ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT.[2]

THIS number contains as usual a mass of valuable material. Professor Viktor Bruns concludes his important study of "Völkerrecht als Rechtsordnung," published it must be admitted at a rather disheartening time. There is a clear and well-documented study by Prof. Ludwig Kaas on the Concordat between Italy and the Vatican, an interesting account by Dr. Angèle Auburtin of new American books on Sociological Jurisprudence and the Philosophy of Law, to mention only a few of the articles. The number contains also notes of decisions by international courts, treaties, diplomatic notes, and so forth.

F. P. W.

## CIVIL CODES ANNOTATED.

THE second half of the French Civil Code in this series[3] has now appeared. This completes the Code.

For readers of German this edition is to be strongly recommended. The notes are short, but to the point, and they contain references to the latest cases and to the most recent commentaries. Any lawyer with a modicum of German can, by consulting this work, be put on the track of the best French sources. It is an extremely useful book.

F. P. W.

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[1] *Le Code Civil, Livre du Centenaire*, vol. ii, p. 862.

[2] (Berlin : Walter de Gruyter & Co., 1933.) 28 M.

[3] *Die Zivilgesetze der Gegenwart.* Band I. *Frankreich, Code Civil.* Zweite Hälfte. Art. 1101–2281. (Berlin: Bensheimer, 1932.) Pp. 933. 50 Marks. The first half was reviewed in the *Journ. Comp. Leg.*, Third Series, vol. xi, p. 174.

We have also to acknowledge:[1]

*Local Government in Many Lands.* By G. Montague Harris, O.B.E., M.A. (London: P. S. King & Son, Ltd.) Pp. x + 409. 15*s*.

*The American Doctrine of Judicial Supremacy.* By Charles Grove Haines. (University of California Press.) Pp. xviii + 705. $6.

*The Individual and the Community.* By Wen Kwei Liao. (London: Kegan Paul, Trench, Trübner & Co., Ltd.) Pp. xv + 314. 15*s*.

*Theory of the Credit Standard.* By Hans Glückstadt. (London: P. S. King & Co., Ltd.) Pp. xv + 345. 15*s*.

*Federations: A Study in Comparative Politics.* By D. G. Karve, M.A. (London: Humphrey Milford, Oxford University Press.) Pp. xv + 318. 4*s*. 6*d*.

*Everyday Law for Women.* By Helena Normanton. (London: Ivor Nicholson & Watson, Ltd.) Pp. xiii + 415. 5*s*.

*Digest of Co-operative Law at Home and Abroad.* By Margaret Digby. (London: P. S. King & Son, Ltd.) Pp. xxii + 304. 7*s*. 6*d*.

*The Road to the Law.* By Dudley Cammett Lunt. (London: McCraw-Hill Publishing Co., Ltd.) Pp. xiv + 281. 10*s*. 6*d*.

*Conciliation and Arbitration in Industrial Disputes.* (London: P. S. King & Son, Ltd.) Pp. ix + 696. Paper, 16*s*.; Cloth, 20*s*.

*The Annual Register*, 1932. Ed. by M. Epstein, M.A., Ph.D. (London: Longmans, Green & Co., Ltd.) 30*s*.

*The Problem of Disarmament.* Ed. by Richard Schmidt and Adolf Grabowsky. (Berlin: Carl Heymanns Verlag.) Pp. 235.

*The Function of Law in the International Community.* By H. Lauterpacht, LL.D. (London: Humphrey Milford, Oxford University Press.) Pp. xxiv + 469. 25*s*.

*De Jure Belli Libri Tres of Alberic Gentili.* 2 vols. Trans. by John C. Rolfe. (London: Humphrey Milford, Oxford University Press.) 35*s*.

*Treaty Making Procedure.* By Ralph Arnold. (London: Humphrey Milford, Oxford University Press.) Pp. xi + 69. 4*s*. 6*d*.

*The Cambridge History of the British Empire.* Vol. 7. Part I, Australia, Part II, New Zealand. (London: Cambridge University Press.) Pp. xix + 759 and xiii + 309. 30*s*. and 15*s*.

*The Responsibility of the Directors of Limited Liability Companies registered in Great Britain, U.S.A., Belgium and France. Foreign Law Series*, 3. (London: Sweet & Maxwell, Ltd.; and Paris: Recueil Sirey.) Pp. 187. 10*s*. 6*d*.

*Annual Survey of English Law.* (London: Sweet & Maxwell, Ltd.) Pp. lv + 401. 10*s*. 6*d*.

*Jurisdiction and Recognition in Divorce and Nullity Decrees: The International Position.* Ed. by Wm. Latey. (London: Sweet & Maxwell, Ltd.) Pp. 111. 5*s*.

*The New Jurisprudence.* By Edward Jenks. (London: John Murray.) Pp. xii + 290. 9*s*.

[1] Mention here does not preclude a review later.

*Modern Theories of Law.* (London: Humphrey Milford, Oxford University Press.) Pp. vi + 229. 8*s.* 6*d.*

*Air Power and War Rights.* 2nd ed. By J. M. Spaight. (London: Longmans, Green & Co., Ltd.) Pp. ix + 495. 25*s.*

*British Yearbook of International Law,* 1933. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 246. 16*s.*

*The Foreign Office.* By Sir John Tilley and Stephen Gaselee. (London: G. P. Putnam's Sons, Ltd.) Pp. xiv + 335. 7*s.* 6*d.*

*The Bulwarks of Peace and International Justice.* By Heber L. Hart, K.C. (London: Methuen & Co., Ltd.) Pp. xxvi + 240. 7*s.* 6*d.*

*The Statute of Westminster,* 1931. By K. G. Wheare. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 128. 6*s.*

*A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries.* 2 vols. Ed. by A. H. Fuller and Manley O. Hudson. (Washington, D.C.: Carnegie Endowment for International Peace.) Pp. xxxi + 730 and xiii + 731–1505. $5.

*The Parliamentary Powers of English Government Departments.* By John Willis. (London: Humphrey Milford, Oxford University Press.) Pp. 214. 16*s.* 6*d.*

*Les Principes généraux du Droit Administratif allemand.* By Fritz Fleiner. (Paris: Librairie Delagrave.) Pp. 280.

*Grammaire de la Politique.* By Harold J. Laski. (Paris: Librairie Delagrave.) Pp. 362.

*La Vie politique et constitutionnelle des Peuples.* Supplément 1933. Annuaire Interparlementaire. By Léopold Boissier et Mirkine-Guetzévitch. (Paris: Librairie Delagrave.) Pp. 96.

*La Nationalité dans la Science sociale et dans le Droit contemporain.* (Paris: Recueil Sirey.) Pp. xi + 347. Frs. 45.

*Droit constitutionnel international.* By Mirkine-Guetzévitch. (Paris: Recueil Sirey.) Pp. 298. Frs. 40.

*Annuaire de l'Institut International de Droit public.* (Paris: Les Presses Universitaires de France.) Pp. 809.

*Précis de Droit International Privé.* Vol. II. By P. Arminjon. (Paris: Librairie Dalloz.) Pp. 608.

*La Notion du "Politique" et la Théorie des Différends internationaux.* By Hans Morgenthan. (Paris: Recueil Sirey.) Pp. 92. Frs. 12.

*Grundlagen des räterussischen Strafrechts.* By Dr. jur. Reinhart Maurach. (Berlin: Franz Vahlen Verlag.) Pp. 205. RM. 9.50.

*Der Board of Directors der Englischen Aktiengesellschaft.* By Dr. Herbert D. Klein. (Leipzig: Bernhard Tauchnitz A.G.) Pp. 71. RM. 3.

*Das Kriegsverhütungsrecht des Völkerbundes.* By Dr. jur. Paul Barandon. (Berlin: Carl Heymanns Verlag.) Pp. xi + 406. RM. 24.

*Kölner Arbeiten zum Englischen Recht.* Heft 6. *Die Testierfreiheit und ihre Beschränkungen im Britischen Reich.* By Dr. Günter Hoeck. Pp. 40. RM. 25. Heft 7. *Fiduziarische geschäftsführungsverhältnisse im Englischen Recht.* By Dr. Heribert Tyrell. Pp. vii + 35. RM. 2.25. (Leipzig: Bernhard Tauchnitz.)

*Internationales Privatrecht.* By Dr. Martin Wolff. (Berlin: Julius Springer.) Pp. vi + 159. RM. 9.60.

*Adatrechtbundels.* xxxvi. *Borneo, Zuid-Selebes, Ambon Enz.* (The Hague: Martinus Nijhoff.) Pp. 415. Gld. 6.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.